No. 92-5653-CSY
Status: GRANTED
CAPITAL CASE

Docketed:
August 25, 1992

Title: Dorsie Lee Johnson, Jr., Petitioner
v.
Texas

Court: Court of Criminal Appeals of Texas

Counsel for petitioner: Braden,Scott W., Tigar,Michael E. Tigar

Counsel for respondent: Morales,Dan

Entry	Date	Note	Proceedings and Orders
1	Aug 25 1992	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Oct 1 1992		Order extending time to file response to petition until October 12, 1992.
5	Oct 13 1992		Brief of respondent Texas in opposition filed.
6	Oct 22 1992		DISTRIBUTED. November 6, 1992
7	Feb 16 1993		REDISTRIBUTED. February 19, 1993
8	Feb 16 1993	X	Supplemental brief of petitioner filed.
12	Feb 19 1993		The motion of petitioner for leave to proceed in forma pauperis is GRANTED. Petition for writ of certiorari GRANTED limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, March 22, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 12, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, April 22, 1993. Case is set for oral argument on Monday, April 26, 1993. Rule 29 does not apply in this case. **********
13	Mar 5 1993		SET FOR ARGUMENT MONDAY, APRIL 26, 1993. (1ST CASE).
14	Mar 18 1993		Record filed.
		*	Original proceedings Court of Criminal Appeals of Texas. (2 BOXES)
15	Mar 22 1993		Brief of petitioner Dorsie L. Johnson filed.
16	Mar 22 1993		Joint appendix filed.
19	Mar 24 1993		CIRCULATED.
18	Apr 8 1993	G	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
20	Apr 9 1993	X	Brief of respondent Texas filed.
21	Apr 22 1993	X	Reply brief of petitioner filed.
22	Apr 26 1993		Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.

EDITOR'S NOTE

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ORIGINAL

(2)

No. 92-5653

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DORSIE LEE JOHNSON

Petitioner,

V.

THE STATE OF TEXAS

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

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27pp

QUESTIONS PRESENTED

1. Did the Texas capital sentencing statute unconstitutionally preclude the jury from giving full mitigating effect to the petitioner's youthful age at the time of the offense?

2. If, during voir dire in a capital case, a prospective juror states that she would not consider a teenage capital defendant's youth to be a mitigating factor in rendering a decision on punishment, should the trial judge dismiss the prospective juror for cause at the request of defense counsel?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

CITATION TO OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Facts Material to the Questions Presented 3

B. How the Issues Were Raised and Decided Below 5

REASONS FOR GRANTING THE WRIT:

I. THE TEXAS CAPITAL SENTENCING STATUTE UNCONSTITUTIONALLY PRECLUDED THE JURY FROM GIVING FULL MITIGATING EFFECT TO THE PETITIONER'S YOUTHFUL AGE AT THE TIME OF THE OFFENSE. 6

II. THIS CASE PRESENTS IMPORTANT QUESTIONS OF UNSETTLED LAW THAT ARE CURRENTLY BEFORE THE COURT IN GRAHAM V. COLLINS, CERT. GRANTED, 60 U.S.L.W. 3827 (JUNE 8, 1992). 23

III. THE COURT OF CRIMINAL APPEALS ERRED BY AFFIRMING THE TRIAL COURT'S REFUSAL TO EXCUSE FOR CAUSE A JUROR WHO STATED SHE WOULD NOT CONSIDER YOUTH AS A MITIGATING FACTOR AT THE SENTENCING PHASE. 27

CONCLUSION 31

TABLE OF AUTHORITIES

CASES

Boyde v. California, 494 U.S. 370 (1990) 19, 20

Brewer v. Arkansas, 608 S.W.2d 363 (Ark. 1980) . . . 29

Brown v. Francis, 326 S.E.2d 735 (Ga. 1985), cert. denied, 474 U.S. 865 (1985) 10

California v. Brown, 107 S. Ct. 837 (1987) . . . 31, 32

Cannon v. State, 691 S.W.2d 664 (Tex. Crim. App. 1985), cert. denied, 474 U.S. 1110 (1986) 11

DeLuna v. Lynaugh, 890 F.2d 720 (5th Cir. 1989) . . . 19

Eddings v. Oklahoma, 455 U.S. 104 (1982) . . . . passim

Ferguson v. State, 573 S.W.2d 516 (Tex. Crim. App. 1978), cert. denied, 442 U.S. 934 (1979) . . . 11

Finney v. State, 320 S.E.2d 147 (Ga. 1984), cert. denied, 470 U.S. 1088 (1985) 10

Franklin v. Lynaugh, 487 U.S. 164 (1988) . . . . passim

Graham v. Collins, cert. granted, 60 U.S.L.W. 3827 (June 8, 1992) 2, 24

South Carolina v. Gathers, 490 U.S. 805 (1989) . . . 21

Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992) . . 18, 19, 24

Gregg v. Georgia, 428 U.S. 153 (1976) 8

High v. Kemp, 819 F.2d 988 (11th Cir.), cert. denied, 455 U.S. 927 (1987) 10

Hill v. Lockhart, 927 F.2d 340 (8th Cir.), cert. denied, 112 S. Ct. 344 (1991) 10

Hitchcock v. Dugger, 481 U.S. 393 (1987) 14, 24, 26, 31

Ice v. Commonwealth, 667 S.W.2d 671 (Ky.), cert. denied, 469 U.S. 860 (1984) 10

Johnson v. State, 773 S.W.2d 322 (Tex. Crim. App. 1989) 2, 6, 29

Jurek v. Texas, 428 U.S. 262 (1976) 16, 25

Lackey v. State, 819 S.W.2d 111 (Tex. Crim. App. 1989) . 18

Lockett v. Ohio, 438 U.S. 586 (1978) . . . . . passim

Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987) . . . 10

Moore v. Balkcom, 716 F.2d 1511 (11th Cir. 1983), cert. denied, 465 U.S. 1084 (1984) 10

Morgan v. Illinois, 112 S. Ct. 2222 (1992) . . . 28, 30

Payne v. Tennessee, U.S. , 115 L. Ed. 2d 720 (1991) . . 21

Penry v. Lynaugh, 492 U.S. 302 (1989) . . . . passim

People v. Frank, 798 P.2d 1215 (Cal. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 2816 (1991) . . 10

Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977) . . 8

Skipper v. South Carolina, 476 U.S. 1 (1986) . . . 24, 31

Stanford v. Kentucky, 492 U.S. 361 (1989) . . . 10, 11

State v. Barber, 753 S.W.2d 659 (Tenn.), cert. denied, 488 U.S. 900 (1988) 10

State v. Bey, 548 A.2d 887 (N.J. 1988) 29

State v. Searcy, 798 P.2d 914 (Idaho 1990) 10

State v. Valencia, 645 P.2d 239 (Ariz. 1982) 10

Stewart v. State, 686 S.W.2d 118 (Tex. Crim. App. 1984), ... 22

Sumner v. Shuman, 483 U.S. 66 (1987) 8

Turner v. Louisiana, 85 S. Ct. 546 (1965) 30

STATUTES

28 U.S.C. § 1257(3) 3

Tex. Code Crim. Proc. Ann. Art. 37.071 (West 1990) . 3, 15, 16

MISCELLANEOUS

Erikson, Childhood and Society 261-263 (1963) . . . 12

Gordon, The Tattered Cloak of Immortality, in Corr and McNeil, eds., Adolescence and Death 16, 27 (1986) . 12

Kastenbaum, Time and Death in Adolescence, in Feifel, ed., The Meaning of Death 99, 104 (1959) . . . 13

Streib, Death Penalty for Juveniles 3-20, 184-189 (1987) 13

IN THE SUPREME COURT
OF THE UNITED STATES

No. _____

DORSIE LEE JOHNSON

Petitioner,

-v-

THE STATE OF TEXAS

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner, Dorsie Lee Johnson, respectfully requests that this Court grant certiorari to review the judgment and opinion of the Texas Court of Criminal Appeals.

CITATION TO OPINION BELOW

The en banc opinion of the Texas Court of Criminal Appeals is published, Johnson v. State, 773 S.W.2d 322 (Tex. Crim. App. 1989). A copy of the opinion is attached as Appendix A. The Court of Criminal Appeals denied Mr. Johnson's motion for rehearing on May 27, 1992. A copy of the opinion is attached as Appendix B.

JURISDICTION

Mr. Johnson invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The issues in this case implicate the Sixth, Eighth and Fourteenth Amendments to the United States Constitution which read, in pertinent part:

Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

Eighth Amendment

> [N]or [shall] cruel and unusual punishments [be] inflicted.

Fourteenth Amendment

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

It also involves the former Texas capital sentencing statute, Tex. Code Crim. Proc., Art. 37.071, which provided in pertinent part:

> (b) On conclusion of the presentation of the evidence, [at the sentencing phase of a capital murder trial] the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
>
> . . . .
>
> (e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. . . . .

STATEMENT OF THE CASE

A. Facts Material to the Questions Presented

Dorsie Lee Johnson, a nineteen year-old, black male was indicted by a Scurry County, Texas grand jury in May 29, 1986, for the March 23, 1986 capital murder of Jack Huddleston, a white male. The indictment alleged that Mr. Johnson intentionally caused the death of Mr. Huddleston in the course of committing a robbery. See Tr. at 2. A jury convicted Mr. Johnson of capital murder on November 12, 1986.

During voir dire, defense counsel questioned venireperson Susan Kiker regarding her feelings about youth as a potential mitigating factor during her deliberations at the punishment phase. Ms. Kiker stated that an individual who committed a crime should be dealt the same punishment despite his chronological or mental age. S.F. vol. X:4087.

> Q. Well, again, you know, if you have a young person and of you heard -- if you had already found him guilty of one crime and you heard evidence of other similar

crimes ---.

A. You know, a younger person -- just because he's a younger person, say, fifteen or nineteen or twenty, doesn't necessarily mean his maturity is all that young or old. And, you know, a younger person may have the mind of a very mature adult. So I can't say that just because he is young and in his younger years that as he grew older he might not ever commit another crime because I know a lot of forty year old men that are still very young.

Q. You would agree that he could also...[h]ave a very immature mind...for whatever age, nineteen, eighteen, that they might have the maturity of a twelve year old, for instance.

A. That's right.

Q. Do you think that type person should be treated the same as the person who was nineteen and had the maturity of a twenty-five year old? Talking about a person who, say, was nineteen and had the maturity level of a twelve year old?

A. Should they be treated the same? In what instance? This instance right now?

Q. In the punishment phase?

A. A punishment type situation, yes, I do. I think so. I think they should be treated the same.

S.F. vol. X:4085-87. The court overruled defense counsel's challenge for cause regarding Ms. Kiker, and denied his request for an additional peremptory challenge. S.F. vol.X:4110. Ms. Kiker became juror number eight at Mr. Johnson's trial.

At the punishment phase defense counsel beseeched the jury to consider Mr. Johnson's age as a mitigating factor:

> Mitigating circumstances are those that indicate that you should be less harsh with your punishment, if you will. That is one way to look at it. They mitigate, lessen the harshness of it.
>
> So, as to deliberate, did he have full realization of what he was doing and what the effect would be of what he was doing? You found that he intentionally shot him. That is true. So, now, was it deliberate? Did he have full realization as to what he was doing? So the mitigating circumstances to that might be his age. I don't know that that is all of the mitigation in the case if he should have at the age of nineteen full realization. But the other one you heard -- do you remember -- first off, you have heard much testimony from several people that he had gotten involved in drugs, the use of marijuana and the use of cocaine. I would suggest that when people get so involved with the drugs that they cannot contemplate what their actions and what the consequences of their actions is going to be, that they cannot formulate decisions and deliberate with full realization of what they are doing.

S.F. vol. XV:434. The trial court instructed the jury only on the two special issue questions, which the jury answered affirmatively. Therefore, in accordance with the law, the trialcourt sentenced Mr. Johnson to death.

B. How the Issues Were Raised and Decided Below

In his direct appeal to the Texas Court of Criminal Appeals, Dorsie Johnson raised seven points of error. Point of error five argued that the trial court erred in overruling Mr. Johnson's challenge for cause as to venireperson Susan Kiker on the grounds that she could not consider age as a mitigating factor in the punishment phase and in failing to grant Mr. Johnson an additional peremptory challenge upon request. The Texas Court of Criminal Appeals rejected Mr. Johnson's argument holding that "[t]he mere fact that a prospective juror, during voir dire, acknowledges that in their mind such evidence deserves little or no weight, does not create a sustainable challenge." Johnson v. State, 773 S.W.2d 322, 331 (Tex. Crim. App. 1989).

Mr. Johnson's motion for rehearing raised the constitutional error, in light of Penry v. Lynaugh, 492 U.S. 302 (1989), of the

trial court's failure to excuse jurors Barbee, Kiker, and Lammert for cause. Mr. Johnson argued that because each of these jurors had stated at voir dire that they would not consider his youth as a mitigating circumstance at sentencing, all three jurors should have been struck for cause. The Court of Criminal Appeals declined to consider these points of error on rehearing.

Mr. Johnson further urged rehearing of the trial court's failure to instruct the jury that it could consider and give effect to the mitigating evidence of youth, based upon this Court's (then) recent holding in Penry v. Lynaugh, 492 U.S. 302 (1989). Mr. Johnson noted that this court ruled in Penry merely five days following the Texas Court of Criminal Appeals' affirmation of Mr. Johnson's death sentence. He argued that "Penry stands for the proposition that the jury in a capital case should be provided with a vehicle for expressing its 'reasoned moral response' to mitigating evidence in rendering its sentencing decision...the reasoning in Penry applies with equal force and effect to this case." App. Motion at 7-8. Mr. Jonson's motion for rehearing was denied on May 27, 1992.

REASONS FOR GRANTING THE WRIT

I. THE TEXAS CAPITAL SENTENCING STATUTE UNCONSTITUTIONALLY PRECLUDED THE JURY FROM GIVING FULL MITIGATING EFFECT TO THE PETITIONER'S YOUTHFUL AGE AT THE TIME OF THE OFFENSE.

A. Introduction

The body of law developed by this Court leads to the

inescapable conclusion that youth is a paradigmatic mitigating factor when a sentencer seeks to decide whether a sentence of life or death is appropriate. This principle finds genesis in Gregg v. Georgia:

> In addition, the jury's attention is focused on the character of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against the imposition of capital punishment (e.g., his youth...)

Gregg v. Georgia, 428 U.S. 153, 197 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.) (emphasis added).

A year later, in Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977), youth was foremost among potential elements of mitigation in a capital sentencing proceeding:

> [The sentencer is constitutionally bound to consider circumstances] such as the youth of the offender, . . . the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct.

Id. at 637 (emphasis added).[1]

Lockett itself confirms the centrality of youth as a mitigating factor. Lockett v. Ohio, 438 U.S. 586 (1978). The Ohio capital sentencing statute failed under the Eighth Amendment because it precluded the jury from considering mitigating evidence except as that evidence bore on three narrow questions. See id. at 607. This Court held that scheme unconstitutional

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[1] See also Sumner v. Shuman, 483 U.S. 66, 81-82 (1987) (quoting with approval Roberts' descriptive list of potential mitigating factors, and striking down Nevada statute imposing mandatory death penalty for prison murders committed by life-term inmates).

because, inter alia, "considerations of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision." Id. at 608 (emphasis added).

When a majority of this Court endorsed Lockett in Eddings v. Oklahoma, 455 U.S. 104 (1982), it again specifically emphasized the critical importance of a defendant's youth as evidence mitigating against the death penalty. As the Court explained,

> Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence. Eddings was a youth of sixteen years at the time of the murder. ... The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage . . . [J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.

455 U.S. at 115-116 (all emphases added).[2] Justice O'Connor noted that the defendant's status as a minor required that the Court take "extraordinary measures" to ensure that his evidence in support of a life sentence be fully and fairly considered. Id. at 118 (O'Connor, J., concurring).

In 1989, this Court considered whether the Eighth Amendment

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[2] Even the dissenting Justices acknowledged that a young defendant's age is a mitigating factor which can, alone, support a sentence less than death. Eddings, 455 U.S. at 122 (Burger, C.J., dissenting) (noting that trial court had "taken account of Eddings' unfortunate childhood," and did not conclude that "either [Eddings'] youth or his family background was sufficient to offset the aggravating circumstances....") (emphasis added).

permitted the execution of seventeen-year-old capital defendants[3] at all; Justice Scalia rested this Court's holding that the Constitution erects no such per se bar on the condition that "individualized consideration is a constitutional requirement [in capital cases],... and one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age."[4] Stanford v. Kentucky, 492 U.S. 361, 375

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[3] That is, persons who were seventeen years old at the time of the capital offense in question.

[4] This Court's conclusions with respect to the powerful mitigating relevance of a capital defendant's youth have been echoed by numerous courts. See, e.g., Hill v. Lockhart, 927 F.2d 340, 343 (8th Cir. 1991) ("[t]he determination whether an individual qualifies as a youth for purposes of mitigating against the death penalty is a subjective one appropriately made by a properly instructed jury"), cert. denied, 112 S.Ct. 344 (1991); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987) (defendant's young age [17] "is a powerful mitigating circumstance"); High v. Kemp, 819 F.2d 988, 993 (11th Cir. 1987) ("society's standards of decency" compel "consideration of an eighteen year old's youth as a mitigating factor"), cert. denied, 455 U.S. 927 (1982); Moore v. Balkcom, 716 F.2d 1511, 1524 (11th Cir. 1983) (age of 23 is mitigating), cert. denied, 465 U.S. 1084 (1984); State v. Valencia, 645 P.2d 239, 241 (Ariz. 1982) ("[youth] is a substantial and relevant factor which must be given great weight"); People v. Frank, 798 P.2d 1215 (Cal. 1990) ("[youthfulness] may well constitute a significant mitigating factor"), cert. denied, ___ U.S. ___, 111 S.Ct. 2816 (1991); Brown v. Francis, 326 S.E.2d 735 (Ga. 1985), cert. denied, 474 U.S. 865 (1985); Finney v. State, 320 S.E.2d 147 (Ga. 1984), cert. denied, 470 U.S. 1088 (1985); State v. Searcy, 798 P.2d 914, 921 (Idaho 1990) (defendant's youth, even when murder manifested "exceptional depravity," is "sufficient to avoid capital punishment"); Ice v. Commonwealth, 667 S.W.2d 671, 680 (Ky. 1984) ("There is no question but that [the defendant]'s young age at the time of the offense is an important factor in his case that should have been given serious consideration ... at the sentencing phase"), cert. denied, 469 U.S. 860 (1984); State v. Barber, 753 S.W.2d 659, 669 (Tenn. 1988) (jury was entitled to find defendant's youth mitigating even when he was 29 years old), cert. denied, 488 U.S. 900 (1988).

(1989) (emphasis added).[5] Justices White and Kennedy, and the Chief Justice, joined Justice Scalia in affirming this basic principle, and no Justice disagreed with it.

This consistent line of authority reflects a widely shared understanding about the mitigating value of youth and youthfulness that traces deep roots in Anglo-American society. Although under Texas law a seventeen-year-old is eligible for the death penalty,[6] jurisprudence, history, tradition, science, and common sense all teach that an adolescent may be less culpable for his actions than an adult. As noted above, this Court recognized in Eddings that

> . . . youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.

455 U.S. at 115-116 (citation omitted).[7]

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[5] The traditional importance of youth as a mitigating factor is also reflected in the fact that "[t]wenty-nine states [specifically designate] the defendant's age as a mitigating factor in capital cases." Stanford, 492 U.S. at 375, 375 n. 5 (listing statutes).

[6] See Cannon v. State, 691 S.W.2d 664, 678 (Tex. Crim. App. 1985) (capital sentence for defendant under eighteen years old not unconstitutional), cert. denied, 474 U.S. 1110 (1986); Ferguson v. State, 573 S.W.2d 516, 525 (Tex. Crim. App. 1978) (same), cert. denied, 442 U.S. 934 (1979).

[7] Scientific inquiry confirms this reasonable surmise, especially with respect to teenagers accused of murder. As one group of researchers has concluded,

> Young people are less intellectually mature, more prone to faulty judgment, more susceptible to the influence of others, and less accustomed to making moral decisions than are their elders. Young people likewise may not easily learn from experience or mistakes:
>
> > In their search for a new sense of continuity and sameness, adolescents have to refight many of the battles of earlier years, even though to do so they must artificially appoint perfectly well-meaning people to play the roles of adversaries.
>
> Erikson, Childhood and Society 261-263 (1963). They may be substantially impaired in their ability to control dangerous impulses:
>
> > Risk-taking with body safety is common in the adolescent years . . . [including, for example, teenagers'] car racing, excessive use of drugs and alcoholic beverages, and other similar activities . . . .
>
> Gordon, The Tattered Cloak of Immortality, in Corr and McNeil, eds., Adolescence and Death 16, 27 (1986). Indeed, young people characteristically are so unable to weigh alternatives or evaluate the consequences of their conduct that they may

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> Adolescence is well recognized as a time of great physiological and psychological stress. Our data indicate that, above and beyond these maturational stresses, homicidal adolescents must cope with brain dysfunction, cognitive limitations, and severe psychopathology. Moreover, they must function in families that are not merely nonsupportive but also violent and brutally abusive.

Lewis, Pincus, et. al. Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States (report prepared for presentation to the American Academy of Child and Adolescent Psychiatry) 11 (1987).

unintentionally imperil themselves or others:

> The adolescent lives in an intense present: 'now' is so real to him that past and future seem pallid by comparison. Everything that is important and valuable in life lies either in the immediate life situation or in the rather close future.

Kastenbaum, Time and Death in Adolescence, in Feifel, ed., The Meaning of Death 99, 104 (1959). In sum, "[t]he difference that separates [juveniles] from adults [is their] immature, undeveloped ability to reason in an adultlike manner." Streib, Death Penalty for Juveniles 3-20, 184-189 (1987).

This discussion demonstrates that youth, perhaps above all other potential mitigating factors, can elicit the reasoned moral response that a death sentence is inappropriate in a given case. However, the jury that sentenced Mr. Johnson was unable to voice the conclusion that Mr. Johnson's youth justified a life sentence notwithstanding the answers to the special issues.

B. The decision of the Court of Criminal Appeals is inconsistent with this Court's decision in Penry v. Lynaugh.

1. The Franklin and Penry Decisions

a. The Franklin decision

In Franklin v. Lynaugh, 487 U.S. 164 (1988), this Court rejected an "as applied attack" on the Texas capital sentencing scheme. Six justices, in two separate opinions, found that the second special issue adequately encompassed mitigating evidence of a good disciplinary record while in prison. Justice O'Connor, joined by Justice Blackmun, wrote a concurring opinion to express doubts about the Texas scheme, although she found no

constitutional problems with Franklin's sentence.

Citing Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Hitchcock v. Dugger, 481 U.S. 393 (1987) for the proposition that "punishment should be directly related to the personal culpability of the criminal defendant," Franklin, 487 U.S. at 184, Justice O'Connor delineated the limit of a State's power to guide the discretion of a capital sentencer:

> [I]t is clear that a state may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty. Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration.

Id. at 184-5. Justice O'Connor reasoned that Franklin's mitigating evidence of an absence of disciplinary violations was adequately contemplated within the scope of the second special issue. Furthermore, she found that, even if the jury was precluded from giving effect to this evidence to the extent it demonstrated positive character traits beyond the ability to exist peacefully in prison, "that limitation has no practical or constitutional significance... because the [evidence] had no relevance to any other aspect of petitioner's character." Id. at 185.

Although Justice O'Connor decided that a good prison record has no probative value beyond the scope of the special issues, she presaged her Penry opinion by addressing the issue of

mitigating evidence beyond the scope of or not relevant to the special issues:

> If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its "reasoned moral response" to that evidence.

Id. at 185 (emphasis added). When mitigating evidence has no relevance to, or relevance beyond the special issues, a death sentence may be constitutionally unreliable, if the jury is not permitted to give effect to this mitigating evidence. Justice O'Connor intimated that unreliable sentences could result when a Texas defendant presents "[e]vidence of voluntary service, kindness to others, or of a religious devotion [that] might demonstrate positive character traits that might mitigate against the death penalty," id. at 186, or more generally, "facts about the defendant's character or background, or the circumstances of the particular offense that may call for a penalty less than death" id. at 188, irrelevant to or beyond the scope of the special issues.

b. The Penry Decision

This Court's holding in Penry v. Lynaugh addressed a constitutional infirmity in the application of the Texas capital sentencing statute. The Texas sentencing scheme, Tex. Code Crim.

Proc. Ann. Art. 37.071 (West 1990),[8] survived a facial challenge in Jurek v. Texas, 428 U.S. 262 (1976). Justice O'Connor's opinion for the Court in Penry held that the Texas statute, without a special instruction, operated to preclude the sentencer from considering and giving effect to Penry's mitigating evidence. The jury was not "provided with a vehicle for expressing its 'reasoned moral response' to [Penry's mitigating] evidence in rendering its sentencing decision." Penry, 492 U.S. at 328. Relying on Eddings v. Oklahoma, the Court concluded that the lack of a "reasoned moral response" by the jury created the risk that the sentence of death was "imposed in spite of factors which may call for a less severe penalty." Id. This defect of process rendered the sentence unreliable to the extent it constituted a violation of the Eighth and Fourteenth Amendments of the Constitution.

Penry's mitigating evidence consisted of mental retardation and child abuse. In examining the first special issue, this Court determined that retardation was relevant to whether Penry had acted "deliberately,"[9] but that it also had relevance to his moral culpability beyond the special issue, because "[p]ersonal

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[8] The Texas code was amended in 1991, inserting language expressly instructing the jury to consider mitigating evidence introduced by the defendant when deliberating on the special issues. See Tex. Code Crim. Proc. Ann. Art. 37.071(2)(e) (West 1991).

[9] O'Connor, commenting on the fact that "deliberately" was not defined by either the legislature or the Texas Court of Criminal Appeals, understood the word to mean "something more than Penry was guilty of intentionally committing murder." Penry, 492 U.S. at 322.

culpability is not solely a function of a defendant's capacity to act 'deliberately.'" Id. at 322. A rational juror could decide that Penry had acted deliberately, but was nonetheless "less morally 'culpable than defendants who have no such excuse.'" Id. Thus, this Court concluded that without an additional instruction

> defining "deliberately" in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's retardation...thus, we cannot be sure that the jury's answer to the first special issue reflected a "reasoned moral response" to Penry's mitigating evidence.

Id. at 323.

Examining Penry's evidence in the context of the second special issue, the Court found that evidence of abuse and retardation was only relevant as an aggravating factor. Because it suggested a "yes" answer to the question of future dangerousness, "Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." Id. at 324. However, the special issues provided no vehicle through which the jury could give mitigating effect to Penry's evidence.

This Court concluded that in order for a jury to give individualized consideration to a criminal defendant, it must be able to consider and give effect to any relevant mitigating evidence. In spite of the fact that a prosecutor has proven, beyond a reasonable doubt, that the answers to the special issues should be "yes," a jury must still be allowed to give effect to

mitigating evidence relevant to personal culpability that is not relevant to, or beyond the scope of, the special issues.

2. The state court failed to recognize that, similar to Penry's evidence of mental retardation and abuse, Mr. Johnson's youthfulness at the time of the crime has mitigating value beyond the scope of the special issues.

Mr. Johnson was nineteen at the time of the crime for which he was convicted and sentence to death. In rejecting Mr. Johnson's claim that the jury could not fully consider his age as mitigating under the special issues, the state court cited Lackey v. State, 819 S.W.2d 111, 134 (Tex. Crim. App. 1989). Lackey held that mitigating evidence of youth could be given effect under the second special issue. More importantly, the court held that this evidence would entitle Lackey to relief only if he demonstrated a connection between his age "and the facts and circumstances of his criminal acts in the instant case." Id.; see also id. at 134-35 (to gain relief, accused must show his age "somehow specifically reduced his blameworthiness for the murder. ...").

This analysis mirrors that of the en banc Fifth Circuit in Graham. See Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992) (en banc). In Graham, the court held, like the state court in Lackey and Johnson, that "the second special issue affords an adequate vehicle by which the jury can give effect to the mitigating aspect of youth." 950 F.2d at 1031. In addition, and again like the state court in Lackey and Johnson, the Fifth Circuit held

that "youth is not mitigating with respect to conduct not attributable to it. ... To the extent Graham's criminal conduct was not attributable to his youth, his youth neither reduced his culpability nor his future dangerousness." Id.

The requirement that the accused demonstrate a nexus between the mitigating evidence of his youth and the crime for which he was convicted, imposed by both the state and federal courts, cannot be squared with the Eighth Amendment jurisprudence of this Court. Furthermore, in concluding youth can be given mitigating effect under the former Texas special issues, both the state and federal courts ignore the decidedly two-edged quality of youth, and thus overlook the strongest parallel between the mitigating evidence in Penry and the mitigating evidence in Johnson and Graham.[10]

This Court has expressly rejected the notion that a capital defendant's mitigating evidence must explain or excuse his offense in order to become constitutionally mitigating. For example, Boyde v. California, 494 U.S. 370 (1990), disproves the "nexus" thesis. Boyde upheld the challenged California jury

[10] The fact that Mr. Johnson was no longer a minor at the time of the offense is of no moment to the parallel between the cases. The Fifth Circuit in Graham expressly rejects the suggestion that its holding is based on Graham's status as a minor. "The salient factors which make 'youth' mitigating -- principally inexperience with resultant diminished judgment and self-control -- are all generally present among those in their early twenties...." Graham, 950 F.2d at n. 25. In addition, the court in Graham cited its prior opinion in DeLuna v. Lynaugh, 890 F.2d 720, 722 (5th Cir. 1989), as an illustration that the special issues "provide an adequate vehicle for the jury to take into account the defendant's youth." 950 F.2d at 1031. Carlos DeLuna, like Mr. Johnson, was of majority age at the time of the offense. Id.

instructions precisely because they did not preclude the jury's consideration of mitigating evidence -- in particular, evidence that was not linked to the commission of the crime:

> Even were the language of the instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation. Other factors listed in [the statute] allow for consideration of mitigating evidence not associated with the crime itself, such as the absence of prior criminal activity by a defendant, the absence of prior felony convictions, and youth. When [the challenged instruction] is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all non-crime-related evidence.

Boyde, 494 U.S. at 383 (emphasis added).[11]

In the same manner, Justice O'Connor's remarks in South Carolina v. Gathers, illustrate the Court's consistent definition of mitigating evidence, which countenances no "nexus" limitation:

> Our decisions in Lockett and Eddings were based on the proposition that the decision of the capital sentencer is a profoundly moral one. . . . Evidence extraneous to the crime itself is deemed relevant and indeed, constitutionally so. . . . In this case, the sentencing jury heard testimony from [the defendant's] mother, his sister, and his cousin, all indicating that he was an affectionate and caring person. Gathers' sixth grade teacher testified that he was a quiet and affectionate child. . . . None of this evidence was directly relevant to the events of September 13, 1986, but all of it was relevant to the jury's assessment of the defendant and his moral blameworthiness.

[11] In Boyde, the petitioner had contended that "none of the 11 statutory factors in [the California sentencing statute] allowed the jury to consider non-crime-related factors, such as his background and character, which might provide a basis for a sentence less than death." 494 U.S. at 378. The Court rejected Boyde's claim because it determined that the jury could consider non-crime-related mitigating evidence under the challenged instruction, not because the non-crime-related evidence itself was not constitutionally protected.

Gathers, 490 U.S. 805, 817 (1989) (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting on other grounds) (emphasis added).

Finally, Payne v. Tennessee, ___U.S.___, 115 L.Ed.2d 720 (1991), compels the conclusion that "nexus" argument adopted by the state and federal courts are fundamentally out of step with this Court's Eighth Amendment cases. Payne upheld the State's presentation of "victim impact" testimony, concerning the "specific harm" suffered by the victim of the crime and her survivors, in large part because "virtually no limits are placed on the relevant mitigating evidence a defendant may introduce concerning his own circumstances." Payne, 115 L.Ed.2d at 733. This Court emphasized that such mitigating evidence "must be received" and considered, even if none of the mitigating evidence is related to the circumstances of the crime. Id.; see also 115 L.Ed.2d at 735-736 (noting that evidence that defendant was "a good son," "extremely polite," and "suffered from a low IQ" was all constitutionally mitigating, despite not being related to the offense).

3. Without an additional instruction, the jury was unable to give its reasoned moral response to Mr. Johnson's youth.

In his closing argument at trial, Mr. Johnson argued that his youth mitigated against the imposition of the death penalty. S.F. vol. XV:434. Yet, without an additional instruction, the jury was unable to respond to Mr. Johnson's argument. The opinion of the state court below, like the opinion of the Fifth

Circuit in Graham, fails to appreciate the "two-edged" quality of youth under the former Texas sentencing scheme. Mr. Johnson's youth, like Mr. Penry's mental retardation, was "two-edged" in that it indicated a likelihood he would be dangerous in the future, even as it intuitively mitigated in support of a sentence less than death. See Penry, 492 U.S. at 324. As one judge on the Texas Court of Criminal Appeals has recognized,

> ... in answering [the "future dangerousness" inquiry], a jury would decidedly consider the range and severity of the defendant's prior criminal conduct; yet truly "mitigating" evidence -- such as a mental disease or defect, a deprived, abusive childhood or the youth of the defendant -- while mitigating against a death sentence in general, surely has tremendous specific probative weight in favor of answering the future dangerousness question "yes."

Stewart v. State, 686 S.W.2d 118, 125 (Tex. Crim. App. 1984), (Clinton, J., dissenting) (emphasis added); see also Eddings, 455 U.S. at 126 n.8 (Burger, C.J., dissenting) (citing studies indicating that a majority of violent youths do not, in fact, become less violent as they grow older).

Quite simply, youth supports an affirmative answer to the second special issue because the jury must consider a longer period of time -- a more distant "time horizon" -- during which the young defendant may be dangerous, than if he were a mature adult. Because the lower court in this case, like the Fifth Circuit in Graham, erroneously held the opposite, however, it missed the strongest parallel between the evidence in this case and the mitigating evidence in Penry. Although Mr. Johnson's

youth had relevance to the second special issue as an aggravating circumstance, Mr. Johnson's youth mitigates against the death penalty in a manner not contemplated by the former Texas sentencing statute. For the reasons detailed above, youth is directly relevant to personal culpability, yet the former Texas sentencing scheme provides the jury with no vehicle to express their "reasoned moral response" to the mitigating evidence presented at trial.

Thus, a reasonable juror could have found Mr. Johnson's youth mitigated against the imposition of the death penalty. However, that juror may have simultaneously believed beyond a reasonable doubt, that Mr. Johnson would be a future danger to society. Without a vehicle for the jurors to vote for life despite their affirmative answers to the special issue questions, the jurors were provided no means with which they could express their "reasoned moral response" to whether Mr. Johnson should live or die.

II. THIS CASE PRESENTS IMPORTANT QUESTIONS OF UNSETTLED LAW THAT ARE CURRENTLY BEFORE THE COURT IN GRAHAM V. COLLINS, CERT. GRANTED, 60 U.S.L.W. 3827 (JUNE 8, 1992).

On June 8, 1992, this Court granted certiorari in Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992) (en banc), cert. granted, 60 U.S.L.W. 3827 (June 8, 1992). The two questions presented in Graham,[12] afford this Court with its latest opportunity to reach an issue litigated in two prior cases, Franklin v. Lynaugh, 487 U.S. 164 (1988), and Penry v. Lynaugh 492 U.S. 302 (1989). These two cases presented a specific question derivative of a larger perennial issue in this Court's jurisprudence regarding the constitutionality under the Eighth Amendment of any restrictions on the type of relevant mitigating evidence a capital sentencing jury could consider. See, e.g., Lockett v. Ohio, 438 U.S. 586 (1978) (plurality); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1 (1986); Hitchcock v. Dugger, 481 U.S. 393 (1987).

In cases such as Lockett, the issue before this Court was simply whether or not a capital defendant could present "all relevant mitigating evidence" during sentencing. In Penry and Franklin, the specific question was whether Texas' capital

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[12] (1) "May a State limit a capital sentencing jury's consideration of a seventeen-year-old defendant's youth, recognized repeatedly by this Court as a powerful mitigating factor, to answering whether he acted 'deliberately' and might be dangerous in the future, and afford no other basis for taking his youth into account?"

(2) "May a State similarly limit the jury's consideration of such a defendant's positive character and unfortunate circumstances of his family background?"

sentencing statute (prior to its rewriting in 1991) allowed the jury to give proper mitigating "effect" to certain types of mitigating evidence offered by the petitioners during the sentencing phase.[13]

There is an important difference between the two lines of cases: in the former (e.g., Lockett) the issue was whether a State must permit a defendant to offer "any relevant mitigating evidence" to the sentencing jury; in the latter (e.g., Penry), the issue was to what degree a State a may "guide" the jury's consideration of relevant mitigating evidence. See Penry, 492 U.S. at ___ (Scalia, J., dissenting). While the issue presented in Graham and in the instant case may appear only to ask whether a State may guide a capital sentencing jury's consideration of mitigating evidence, Mr. Johnson argues that at least with respect to certain types of mitigation evidence, the issue is whether such mitigating evidence may be presented for the jury's consideration at all. Even the dissenters in Penry agreed that

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[13] This Court first addressed and upheld the facial constitutionality of the Texas death penalty statute in Jurek v. Texas, 428 U.S. 262 (1976). The holding was predicated on the assumption that the Texas sentencing scheme would allow "the defense to bring before the jury whatever mitigating circumstances relating to the individual can be adduced." Id. at 276. The Jurek Court also noted, however, that the Texas statute "does not explicitly speak of mitigating circumstances." Id. at 272. Notably, the Court recognized that the first and third special issues had not yet been construed by the Court of Criminal Appeals. It ultimately concluded in Jurek that the constitutionality of the Texas sentencing scheme would turn on "whether the enumerated questions allow consideration of particularized mitigating factors." Id.

Cases such as Franklin, Penry, Graham, and the instant case are as-applied attacks on the statute.

such a claim, if true, would be meritorious. See id. at ___ ("Of course there remains available ... the contention that a particular mitigating circumstance is in fact irrelevant to any of the ... [pre-1991] special issues, and hence could not be considered.").

At least with respect to the issue of whether a State may "guide" a jury's consideration of relevant mitigating evidence, there are two sub-issues contained in this broader question discussed in Penry. The first is whether the enumerated "special issues" asked in Tex. Code Crim. Pro. Art. 37.071, prior to its 1991 amendment,[14] allow a jury to give full mitigating effect to all of the possible significant ways that a certain type of mitigating evidence may be relevant to the jury's "reasoned moral response" in reaching a sentencing decision. Certain mitigating evidence will have independent mitigating significance beyond the scope of the narrow questions asked by the special issues. See Penry, 492 U.S. at 319, 321; Franklin, 487 U.S. at 186 (O'Connor, J., concurring). The purported "guiding" by the State of the jury's consideration of relevant mitigating evidence amounts to the type of outright exclusion declared unconstitutional in numerous post-Lockett cases. See, e.g., Hitchcock v. Dugger, 481 U.S. 393 (1987) (unconstitutional to keep from capital sentencing jury's consideration "nonstatutory" mitigating evidence offered at trial).

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[14] The pre-1991 version of Art. 37.071 governed petitioner's trial, which occurred in July of 1986.

The second sub-issue is whether a certain type of mitigating evidence qualifies as a "two-edged sword," Penry, 492 U.S. at 324: that is, while the particular evidence may be relevant as aggravating under one or more of the special issues, it may have a mitigating facet beyond the purview of any of the special issues. A quintessential "two-edged sword," mental retardation, was at issue in Penry. As the Court noted, our society recognizes that circumstances of any murder should be mitigated by the fact that the murderer was mentally retarded; however, a rational Texas jury would be more likely to answer the second pre-1991 special issue (regarding future dangerousness) affirmatively in view of the fact that a mentally retarded person is obviously less amenable to rehabilitation than a non-retarded person.

Graham seeks to apply the teachings of Penry to three categories of mitigating evidence: a capital defendant's relative youth at the time of the crime (the petitioner in Graham was seventeen); a defendant's "positive character traits"; and a defendant's "unfortunate circumstances of his family background."

At least one of the three types of mitigating evidence in Graham are directly implicated in Mr. Johnson's case: youthful age. Because of the overlapping issues in the two cases, this Court should defer consideration, as it has in other cases, of Mr. Johnson's petition until the disposition of Graham. See Kelly v. Texas, petition for cert. filed, No. 92-5182, ____ U.S. ____ (1992)(stay of execution entered pending disposition of

petition writ of certiorari raising Graham and Penry); Holland v. Collins, petition for cert. filed, No. 92-5088, ____ U.S. ____ (1992)(stay of execution entered pending disposition of petition for writ of certiorari raising Graham and Penry); Granviel v. Texas, petition for cert. filed, No. 91-8435, ____ U.S. ____ (1992)(execution stayed, case conferenced with no decision and no further conference date scheduled); Richardson v. Texas, petition for cert. filed, No. 91-6745, ____ U.S. ____ (1992)(conferenced with no decision and no further conference date scheduled); Jackson v. Texas, petition for cert. filed, No. 91-5862, ____ U.S. ____ (1992)(same); Earhart v. Texas, petition for cert. filed, No. 91-8105, ___ U.S. ____ (1992)(same). This Court's decision in Graham will surely have a bearing on the proper resolution of Mr. Johnson's case.

III. THE COURT OF CRIMINAL APPEALS ERRED BY AFFIRMING THE TRIAL COURT'S REFUSAL TO EXCUSE FOR CAUSE A JUROR WHO STATED THAT SHE WOULD NOT CONSIDER YOUTH AS A MITIGATING FACTOR AT THE SENTENCING PHASE.

> Any juror to whom mitigating factors are...irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial.

Morgan v. Illinois, 112 S.Ct. 2222, 2235 (1992).

Mr. Johnson was sentenced to die by a jury that included three individuals who would not consider youth as a mitigating factor at the sentencing phase of Mr. Johnson's trial. The Texas Court of Criminal Appeals affirmed the trial court's refusal to excuse juror Kiker for cause despite each of their statements

that they would not view youth as a mitigating.[15] The court stated "it is not error for a trial court to overrule a challenge for cause where it is shown that a juror will not or may not give a particular variety of 'mitigating evidence' any consideration." (Johnson v. State, 773 S.W.2d 322, 331 (Tex. Crim. App. 1989) (citations omitted). Therefore, the court concluded, "[t]he mere fact that a prospective juror, during voir dire, acknowledges that in their mind such evidence deserves little or no weight does not create a sustainable challenge for cause...." Id.

Prior to Morgan, other state courts held that jurors who could not consider certain kinds of mitigating evidence, such as youth, must be excluded for cause. See, e.g., State v. Bey, 548 A.2d. 887, 902 (N.J. 1988) (juror should have been excused for cause "[n]otwithstanding [the juror's] assertion that he would consider the evidence in mitigation, his capacity to deliberate impartially was 'substantially impaired' by his belief that 'if it's a violent crime I think a man should be put to death'"); Brewer v. Arkansas, 608 S.W.2d 363 (Ark. 1980) (trial court erred in refusing to excuse for cause two prospective jurors who could not consider age and/or other mitigating factors). In addition to the merits of this issue, this Court should grant certiorari to resolve the conflict created by the Texas Court of Criminal

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[15] Following the voir dire testimony of the three jurors in question, defendant challenged each one for cause. In each case, that challenge was overruled. In each case, defendant had exhausted his peremptory challenges, and asked the court to grant an additional peremptory challenge to strike the juror who was unsuitable and objectionable to the defendant. In each case that request was denied.

Appeals' divergent holding regarding the constitutionality of not excusing for cause jurors who refuse to consider all mitigating evidence at the punishment phase.

To satisfy the protections granted to Mr. Johnson by the Sixth and Eighth Amendments, any juror that sits on the capital trial of a nineteen year old youth must agree to consider evidence of youth as a mitigating circumstance at the sentencing stage if the facts of a particular case warrant it. In Dorsie Johnson's case, however, at least one juror categorically stated at voir dire that she would not consider youth as a mitigating circumstance. She concluded ex ante that youth would not factor into her sentencing equation, regardless of the development of the facts at trial, and thus "formed an opinion concerning the merits of the case without basis in the evidence at trial." Morgan, 112 S.Ct. at 2235. Such a jury violates the most essential of Sixth Amendment requirements: "[t]he requirement that 'a jury's verdict must be based upon the evidence developed at the trial ' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." Turner v. Louisiana, 85 S.Ct. 546, 549 (1965).

Denied a jury that regarded youth as a relevant mitigating circumstance, Dorsie Lee Johnson faced sentencing by a jury that refused to factor into its sentence one of the fundamental aspects of Eighth Amendment jurisprudence regarding the role of mitigating evidence. This court has stated this principle clearly and unequivocally:

> Our cases explicating the role of mitigating evidence in capital sentencing have rigorously enforced one rule: A sentencing jury must be given the authority to reject imposition of the death penalty on the basis of any evidence relevant to the defendant's character or record or the circumstances of the offense proffered by the defendant in support of a sentence of death. That rule does not merely require that the jury be allowed to hear any such evidence that the defendant desires to introduce, Skipper v. South Carolina, 476 U.S., at 4, 106 S.Ct., at 1670; Hitchcock v. Dugger, 481 U.S. 393, 394, 107 S.Ct., 1821, 1822, 95 L.Ed.2d 347 (1987), it also requires that the jury be allowed to give "independent mitigating weight" to the evidence. Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1973); Eddings v. Oklahoma, 455 U.S. 104, 112-113, 102 S.Ct. 869, 875-876, 71 L.Ed.2d 1 (1982).

Franklin v. Lynaugh, 487 U.S. 164, ___ (1988) (O'Connor, J., concurring).

Dorsie Lee Johnson's jury could give no independent mitigating weight to his youth, as at least one of its members had stated prior to trial that youth would not be considered as a mitigating circumstance at sentencing. Indeed, when questioned regarding the defendant's youth at voir dire, juror R.E. Barbee stated that he didn't think "[Dorsie Johnson's] age would make any difference." S.F. vol.IX:3668. Thus, although the jury was allowed to hear testimony regarding Dorsie's age, they were never in a position to give it full and fair consideration and were not "impartial" in the sense required by the Sixth Amendment.

The jury that sentenced Dorsie Johnson to death was unable to give the "reasoned moral response" to the defendant's youth as required by the Eighth Amendment. See California v. Brown, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring). Members of the jury failed to undertake the requisite "individualized assessment

of the appropriateness of the death penalty" as a "moral inquiry into the culpability of the defendant," Id. Implied within a true "reasoned, moral response" is the consideration of youth as a mitigating factor; Dorsie Johnson's jury began its deliberations absent the ability to figure youth into the complex calculus that eventually called for the death of a nineteen year old boy.

This court has determined that as a matter of law the state may not statutorily preclude the sentencer from considering any mitigating factor. Although the sentencer may determine the weight given to youth as a mitigating factor, "they may not give it no weight by excluding such evidence from their consideration." Eddings v. Oklahoma, 102 S.Ct. 869, 877 (1982) (Powell, J.). The presence of three jurors who state before trial that they will exclude youth as a mitigating factor from their consideration by assigning youth a pre-set value of zero is a violation of Dorsie Johnson's Sixth and Eighth Amendment rights, applicable to the state of Texas through the fourteenth amendment. Because juror Kiker said that she would, in effect, assign no weight to youth as a mitigating factor, she was not able to apply the law and should have been excused for cause. Dorsie Johnson was sentenced by a jury that was not impartial under the Sixth Amendment. This Court should grant certiorari and vacate Mr. Johnson's sentence.

Conclusion

Petitioner Dorsie Lee Johnson respectfully requests this

Court to grant relief on the issues raised herein by vacating his sentence and remanding the case for a new trial. In view of the similarity between the two cases, Mr. Johnson's case should be consolidated with Graham v. Collins, or in the alternative, held for later consideration following the disposition of Graham.

Respectfully submitted,

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Dorsey Lee JOHNSON, Jr., Appellant,

v.

The STATE of Texas, Appellee.

No. 69750.

Court of Criminal Appeals of Texas, En Banc.

June 21, 1989.

Defendant was convicted in the 132nd Judicial District Court, Scurry County, Gene L. Dulaney, J., of capital murder, and he appealed. The Court of Criminal Appeals, McCormick, P.J., held that: (1) trial court did not abuse its discretion in denying motion for change of venue, and (2) trial court did not abuse its discretion in determining challenges of veniremembers for cause.

Affirmed.

Clinton, J., joined only the judgment of the court.

Teague, J., dissented.

1. Criminal Law ⇐1150

When motion for change of venue has been denied, standard of review to be applied by appellate courts is whether, after review of record, evidence reflects trial court abused its discretion in refusing the motion; this abuse of discretion must be determined in light of whether outside influences affecting community climate concerning particular defendant were inherently suspect. Vernon's Ann.Texas C.C.P. art. 31.03.

2. Criminal Law ⇐126(1)

Merely because case is publicized is not, in and of itself, sufficient reason to change venue—venire need not be completely ignorant of facts and circumstances which surround particular case. Vernon's Ann.Texas C.C.P. art. 31.03.

3. Criminal Law ⇐134(4)

Where period of time has passed between publicity complained of and time of trial, such delays tend to negate inference that publicity would affect climate of opinion in community and justify change of venue. Vernon's Ann.Texas C.C.P. art. 31.03.

4. Criminal Law ⇐1150

Where evidence is not sufficient to show that in the community there existed pervasive feeling that ability of movant to receive fair trial by impartial jury was doubtful, then decision rendered by trial court to deny motion for change of venue will not be disturbed on appeal. Vernon's Ann.Texas C.C.P. art. 31.03.

5. Criminal Law ⇐126(1)

Trial court did not abuse its discretion in denying motion for change of venue of capital murder trial; there was no demonstration that publicity was anything other than accurate reporting. Vernon's Ann. Texas C.C.P. art. 31.03.

6. Criminal Law ⇐1134(5)

In making determination as to propriety of rulings on challenges for cause of veniremembers for already forming conclusion as to guilt, court will review and determine if trial court abused its discretion in light of entire examination of veniremember; that is, whether record reflects evidence tends to reasonably support trial court's implied findings that veniremember would be able to perform tasks that are assigned to jurors. Vernon's Ann.Texas C.C.P. art. 35.16(a), par. 10.

7. Jury ⇐103(6)

Evidence that prospective juror in capital murder prosecution would render verdict based upon evidence adduced at trial supported trial court's finding that juror was qualified despite contention that juror had already formed conclusion as to guilt. Vernon's Ann.Texas C.C.P. art. 35.16(a), par. 10.

8. Jury ⇐132

Evidence was sufficient to support trial court's determination in capital murder trial that prospective juror's beliefs in favor of capital punishment would not substantially impair her abilities as juror. Vernon's Ann.Texas C.C.P. art. 35.16(b), par. 1.

9. Criminal Law ⇐1152(2)

In determining whether potential juror was properly excused for cause due to his or her views on capital punishment, it must be determined if trial court abused its discretion in its action regarding veniremember in light of the record; only where record supports trial court's determination that those views would prevent or substantially impair that veniremember's duties in light of instructions and oath will decision made by trial court be undisturbed on appeal. Vernon's Ann.Texas C.C.P. art. 35.16(b), par. 1.

10. Jury ⇐108

Mere fact that prospective juror in capital murder case states that they would not, under any circumstances, answer punishment questions in the affirmative for any reason, is not in and of itself sufficient to disqualify juror. Vernon's Ann.Texas C.C.P. art. 35.16(b), par. 1.

11. Jury ⇐108

Trial court did not abuse its discretion in capital murder trial in excusing for cause veniremember whose opposition to capital punishment likely would have made him balk at deciding punishment issues or falsify his answers. Vernon's Ann.Texas C.C.P. art. 35.16(b), par. 1.

12. Criminal Law ⇐1152(2)

Review of trial court's decision on sufficiency of excuses for not serving as juror shall be whether decision constituted abuse of discretion; where record reasonably reflects tendency to support trial court's holding, decisions as to sufficiency of excuses and propriety of excusals rendered by trial courts shall not be disturbed on appeal. Vernon's Ann.Texas C.C.P. art. 35.03.

13. Jury ⇐75(1)

Trial court did not abuse its discretion in excusing for cause veniremember who stated that she would have difficult time keeping her mind on trial lasting one to four weeks because of her concern for the grandson she was caring for. Vernon's Ann.Texas C.C.P. art. 35.03.

14. Jury ⇐107

It is not error for trial court to overrule challenge for cause where it is shown that juror will not or may not give particular variety of mitigating evidence any consideration. Vernon's Ann.Texas C.C.P. art. 35.16(c), par. 2.

15. Jury ⇐107

Mere fact that prospective juror, during voir dire, acknowledges that in their mind evidence deserves little or no weight does not create sustainable challenge for cause. Vernon's Ann.Texas C.C.P. art. 35.16(b), pars. 1, 3, (c), par. 2.

16. Jury ⇐107

Trial court did not abuse its discretion in capital murder prosecution in finding that juror, who stated she would not consider mental or physical age as mitigating factor at punishment, was disqualified. Vernon's Ann.Texas C.C.P. art. 35.16(c), par. 2.

17. Jury ⇐132

Evidence supported finding of trial court in capital murder prosecution that veniremember was not qualified because she could not satisfy statutory requirement of having ability to read and write. Vernon's Ann.Texas C.C.P. art. 35.16(a), par. 11.

Frank W. Conard, II, Sweetwater, for appellant.

Ernie B. Armstrong, Dist. Atty., Snyder, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

McCORMICK, Presiding Judge.

This is a direct appeal from a conviction of capital murder. V.T.C.A., Penal Code, Section 19.03(a)(2). Appellant was convicted of intentionally causing the death of Jack Huddleston in the course of committing and attempting to commit the offense of robbery. Upon finding appellant guilty of capital murder, the jury affirmatively

answered the special issues under Article 37.071(b)(1) and (2), V.A.C.C.P. Punishment was then assessed at death. We will affirm.

Appellant alleges seven points of error which we will address in the order in which they arose at trial. Appellant does not assert any sufficiency challenges, therefore, recitation of the facts is not required. We do, however, find a brief synopsis of the events which occurred in March 1986, appropriate.

In the early morning hours of Sunday, March 23, 1986, appellant and his accomplice, Amanda Miles, decided to commit a robbery at the Allsup's convenience store in Snyder. After planning the crime, deciding that there should be no witnesses, and waiting for the store to clear of customers, the pair entered the store. On the pretext of wanting a particular item, appellant lured Huddleston, the clerk, back to the cooler where he was told this was a robbery and to lie face down on the floor. Appellant then shot the clerk in the back of the neck with a .25 caliber pistol, killing him. Amanda Miles emptied out the cash drawer taking approximately $160.00 (one hundred sixty dollars). Two cartons of cigarettes were also taken.

Appellant was arrested in April for a subsequent robbery and attempted murder of a store clerk in the neighboring town of Colorado City. It was in the course of investigating this latter offense that appellant confessed to the capital offense committed in Snyder.

In his seventh point of error, appellant alleges that the trial court erred in failing to grant his motion for change of venue. Appellant asserts that the pretrial publicity of his case prevented him from receiving a fair trial, the result of which denied him the right to equal protection and due process. See Article 31.03, V.A.C.C.P.

[1] When a motion for change of venue has been denied the standard of review to be applied by appellate courts is whether after review of the record the evidence reflects the trial court abused its discretion in refusing the motion. *Phillips v. State*, 701 S.W.2d 875 (Tex.Cr.App.1985) cert. denied 477 U.S. 909, 106 S.Ct. 3285, 91 L.Ed.2d 574 (1986). This abuse of discretion must be determined in light of whether outside influences affecting the community climate concerning a particular defendant were inherently suspect. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Phillips*, 701 S.W.2d at 879.

[2, 3] Merely because a case is publicized is not, in and of itself, a sufficient reason to change venue—a venire need not be completely ignorant of the facts and circumstances which surround a particular case. *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); *Eckert v. State*, 623 S.W.2d 359 (Tex.Cr.App.1981) (overruled on other grounds by *Reed v. State*, 744 S.W.2d 112 (Tex.Cr.App.1988)). A further factor to be considered is the passage of time. Where a period of time has passed between the publicity complained of and the time of trial, such delays tend to negate the inference that publicity would affect the climate of opinion in a community. *Nethery v. State*, 692 S.W.2d 686 (Tex.Cr.App.1985) cert. denied, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986); *Adami v. State*, 524 S.W.2d 693 (Tex.Cr. App.1975).

[4] Therefore, where the evidence is not sufficient to show that in the community there existed a pervasive feeling that the ability of the movant to receive a fair trial by an impartial jury was doubtful, then the decision rendered by the trial court to deny such a motion will not be disturbed on appeal. *Beets v. State*, 767 S.W.2d 711, 742 (Tex.Cr.App.1988).

[5] In October, 1986, a hearing was held on appellant's motion for change of venue. Accompanying appellant's motion were ten affidavits from residents of Scurry County. In each affidavit, the affiant swore that in their opinion appellant could not receive a fair trial in the community. However at the hearing, the seven compurgators which appeared testified on cross-examination, that they had changed their minds and now thought appellant could receive a fair trial. In additional support of his motion, and aside from the affidavits attached thereto, appellant introduced into evidence, through several representatives of the local media, news articles printed in newspapers and heard on the radio in Scurry County. The coverage consisted of some 14 to 16 articles of various sizes covering a variety of topics from the actual murder at the time it occurred to a suppression hearing held shortly before the change of venue hearing and selection of the jury.

The State pointed out through cross-examination of these witnesses that the reporting of the case was fair, non-inflammatory and for the purpose of informing the public of a current event. These witnesses also testified that they believed appellant could receive a fair trial.

The State brought forth seven witnesses from various areas of the county who testified that they had not heard any or at least had heard only very little discussion about the case since its occurrence in March. The media coverage had little effect on them or on any of the people they knew. Additionally, these witnesses testified that it was their opinion that appellant could receive a fair and impartial trial from a jury made up of Scurry County residents. At the close of evidence and final statements the trial court denied appellant's motion for change of venue.

In reviewing the testimony adduced at the hearing we find that the evidence supports the decision made by the trial court. The record reflects that the type and fashion of reporting was not of the requisite character as to create a suspect environment which would prevent the rendering of a fair trial, thereby depriving appellant of equal protection and due process of law.

Here it was not demonstrated that the publicity was anything other than an accurate reporting of an unusual occurrence in Scurry County. There was no evidence of any prejudicial or inflammatory remarks made in any of the articles. Additionally, the publicity complained of herein took place over the course of more than six months since the murder and nearly six months since appellant's arrest.

Therefore, the trial court did not abuse its discretion in denying the motion for change of venue. As a result, appellant's seventh point of error is overruled.

Appellant, in his second point of error, alleges that the trial court committed error in denying his challenge for cause of veniremember Nachlinger. Appellant asserts that Nachlinger had already formed a conclusion as to appellant's guilt. See Article 35.16(a)(10), V.A.C.C.P.

[6] In making a determination as to the propriety of rulings on challenges for cause of this variety, the Court will review and determine if the trial court abused its discretion in light of the entire examination of the veniremember. That is, whether the record reflects the evidence tends to reasonably support the trial court's implied findings that the veniremember would be able to perform the tasks that are assigned to jurors in this State. See *Hernandez v. State*, 757 S.W.2d 744 (Tex.Cr.App.1988).

Nachlinger testified that he would follow the law as proscribed by the oath and would render a verdict based solely upon the evidence presented at trial. Nachlinger understood the concept of proof beyond a reasonable doubt and would require the State to provide that proof, otherwise he would return a verdict of not guilty.

During the State's voir dire examination the following colloquy took place regarding the prospective juror's feelings on presumption of innocence:

"Q. [Prosecutor] Do you understand that that indictment is not evidence that he is guilty. It cannot be used or even considered to be evidence that he is guilty?

"A. Yes, sir.

"Q. Do you understand that?

"A. Yes.

"Q. Having been charged with that offense, it merely means that we can go to trial and try to prove our case. He is presumed innocent and will remain innocent and presumed innocent until such time as the State produces evidence which shows beyond a reasonable doubt that he is guilty.

"A. Yes, sir.

"Q. All right. Do you have any problems with the presumption of innocence that the law affords to any individual?

"A. No, sir. That's fair.

"Q. Would agree you would afford that presumption to this defendant? You have not yet determined in your own mind because you have not heard any evidence and you understand the principle that he is presumed innocent at this time as he sits here in the Courtroom. He is innocent and he is not guilty because there has been no proof.

"A. Yes."

During appellant's voir dire examination, Nachlinger was asked about an answer he entered on his questionnaire regarding his personal philosophy, in which he wrote, "[t]he man killed another man who was holding down an honest job. I see little need in a trial." When asked whether he remembered specifics about the crime he said he did not, except that he had heard there was a confession and that is why he had written in that response. When questioned further on his feelings regarding appellant's guilt or innocence the following transpired:

"Q. [Appellant] In your heart now—this is not an abstract thing, but how do you really feel inside?

"A. Well, if you know—if I was listening to this and reading what I have read, if he can be proven otherwise, you know, I'm not completely ironed in on one thing anywhere, but, you know, I have been known to change my mind and I can do it. You know, I'm willing to listen to anything. But, like I say, you know, didn't sound real good.

"Q. Well, again, what you say, if it can be proven otherwise, that is—and you said that you heard that he gave a confession and you have heard people talking about and you have heard that it was a cinch deal and what that kind of tells me is that you must have felt that at some point or at least when you wrote this paper out that Dorsie Johnson must be guilty of this. Is that how you felt when you—I mean just general feelings inside and not thinking about what the State has to prove and this and that, but just how you actually felt?

"A. Well, sir, I suppose so.

"Q. Is that—I suppose so. Do you think that that is really an accurate answer: yes or no?

"A. Yes, sir.

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"Q. Do you think that that conclusion and that idea that you have already set up in your mind and expressed by even saying, 'I see little need in a trial,' you think that would influence your actions and your deliberations and your decision if you were on the Jury?

"A. Well, I hope it wouldn't, but I'm sure it probably could.

"Q. In other words, are you saying—

"A. Yes, sir, I think I could. I don't know, you know.

• • • • • •

"A. Well, you know, you say I have formed a conclusion here. If I was going to take what I have already read and just, you know, pass a verdict now, it would probably be a guilty verdict. But if I was to get on this deal here and, you know, I mean that's not a cut and dried thing in my mind right now, you know. I believe I could go in here open minded, you know. I'd try to do it the best I could.

• • • • • •

"Q. Honestly and from your feelings and not from abstract ideas, but just from your heart?

"A. Well, I'm—you know, I know what you're getting at here. I know what I wrote down on the questionnaire and all, but, well—you know, you just kind of leading it around and I feel like I've told you now two or three times, but I don't really know how to go ahead and tell you is what I'm getting at. I feel like I've already told you this a couple of times, you know. I don't know really what you're hunting or pushing on here.

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"Q. Do you understand that if a person—if those conclusions from a person or yourself or any Juror influences their decision—in other words, if it caused you to say, well, I think he is guilty, but if he can convince me he is not, you understand that person would have the duty not to be on that Jury?

"A. Yes, sir.

"Q. And do you feel that you would fit that category because of that reason? [No response]

"Q. Of course, there is nothing wrong with it if you fit that category and because you have read all of those things or heard people talking about them, there is nothing wrong with that. If you feel that you would, then that is what I would like to know.

"A. Yes, sir. I believe it could have some effect on my judgment.

"Q. You think—I hate to keep pushing. You say it could have. Do you think it would have?

"A. Yes, sir."

It was at this time that appellant challenged veniremember Nachlinger for cause on the ground that Nachlinger had already formed an opinion as to appellant's guilt. Article 35.16(a)(10), V.A.C.C.P. The judge overruled the challenge and allowed further questioning by the State which drew another objection from appellant in that pursuant to Article 35.16(a)(10), supra, no further questioning should be allowed.[1] This objection was overruled[2] and examination by the State continued in part as follows:

"Q. [Prosecutor] All right. Now, then, do you know anything—know anything that tells you beyond a reasonable doubt at this time that Dorsie Johnson is the one that committed this crime?

"A. No, sir.

"Q. And would you require the State, that is me and my witnesses, to prove to you beyond a reasonable doubt that this Dorsie Johnson is the one that committed the crime before you found this Dorsie Johnson guilty?

"A. Yes, sir. It'd have to be proven to me."

[7] Nachlinger stated that the State would have to prove appellant's guilt beyond a reasonable doubt, that he understood the presumption of innocence and would abide by it and that he would render a verdict based upon the evidence adduced at trial. There is sufficient evidence in the record to support the trial court's implied finding of fact that Nachlinger was a qualified juror. Therefore, the trial court did not abuse its discretion in overruling appellant's challenge for cause. *Nethery v. State*, 692 S.W.2d 686 (Tex.Cr.App.1985) cert. denied, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986); *Barefoot v. State*, 596 S.W.2d 875 (Tex.Cr.App.1980) cert. denied, 453 U.S. 913, 101 S.Ct. 3146, 69 L.Ed.2d 996 (1981). Appellant's second point of error is overruled.

[8] In appellant's sixth point of error he alleges that the trial court erred in denying his challenge for cause as to veniremember Bruner. Appellant alleges that Bruner could not consider a life sentence in a capital case and as a result demonstrated a prejudice against the law applicable to appellant and upon which he was entitled to rely. Article 35.16(c), (2), V.A.C.C.P.

The standard of review in these circumstances turns on whether the trial court abused its discretion by overruling the challenge for cause. In determining abuse of discretion, this court shall review the

1. Appellant also objected based on Article 35.16(a)(8), which allows for the discharge of a veniremember due to the fact "he had served on a petit jury in a former trial of the same case." There is no evidence in the record to support such an objection nor is this raised in appellant's appeal. Therefore, we need not determine its validity.

2. Appellant raises the failure of the trial court to suspend examination and discharge Nachlinger pursuant to Article 35.16(a)(10), as a part of his second point of error being discussed herein. Although Nachlinger was "unequivocal" in one particular response, when viewed in the context of the preceding examination, the record reflects that Nachlinger was anything but "unequivocal" as to whether, in his opinion, the conclusion regarding appellant's guilt would influence his verdict. Therefore, the trial court did not err in allowing further questioning.

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record and determine if it supports the trial court's implied finding that the prospective juror's views would not "prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and oath." *Cockrum v. State*, 758 S.W.2d 577 (Tex.Cr.App.1988) cert. denied — U.S. ——, 109 S.Ct. 1358, 103 L.Ed.2d 825 (1989); *Hernandez*, 757 S.W.2d at 752.

The examination of Bruner regarding the imposition of sentence revealed that Bruner would not automatically vote "yes" when answering the punishment questions because not every murder deserved the death penalty, although she felt that a capital crime deserved the death penalty. She stated that she would wait to hear all of the evidence presented at punishment before determining the answers to the punishment questions.

During appellant's examination, Bruner was asked if she would answer the punishment questions "yes" so appellant would receive the death penalty which Bruner had stated was the only proper punishment for a capital crime. To this she responded:

"A. I'll put it like—if I answered all of these yes because the State proved it, I would answer them all yes.... [b]ut if it is not proven to me to answer all of these yes, I'll put one no, yes, or maybe two, whatever. Right now I can't answer that, really."

On further examination by the State, Bruner reiterated that as to the punishment questions, she would not automatically answer them "yes" thereby disregarding the evidence presented. She understood her oath and stated that she would not violate it just so the death penalty could be imposed.

The court, in an effort to clear up any ambiguities in her answers regarding punishment engaged in the following discussion:

[Trial court]

"Q. You would still vote no? Would you still vote no knowing it would possibly be life if you voted no?

"A. Right.

"Q. If it was [sic] failed to be proven to you that it should be yes, could you vote no?

"A. On the second phase—yes, on the second phase. Yes, sir, if its proven.

• • • • • •

"Q. You haven't answered my question. Could you vote no if it was not proven to you that—

"A. Yes.

"Q. —that you can vote yes—

"A. Yes, I could vote no.

"Q. You would do that if the evidence did not show it to be yes?

"A. Yes, sure, I would."

Based on the totality of the voir dire, it is evident that Bruner would listen to all of the evidence, put her personal feelings aside, and answer the punishment questions based upon that evidence. Although, she initially would have answered the questions "yes" if appellant were found guilty, after the veniremember understood the process involved she testified that she would listen to the evidence provided at the punishment phase and would answer the special issue questions on punishment accordingly. As a result, there is sufficient evidence in the record to support the trial court's determination that Bruner's beliefs would not substantially impair her abilities as a juror in light of the instructions and oath. *Hernandez v. State*, 757 S.W.2d 744 (Tex.Cr.App.1988). The trial court, therefore, did not abuse its discretion in overruling appellant's challenge for cause of veniremember Bruner. Appellant's sixth point of error is overruled.

Appellant's fourth point of error alleges that the trial court erred in sustaining the State's challenge for cause of veniremember Graves. Appellant asserts that it was not sufficiently shown that Graves would automatically answer the punishment questions in the negative. See Article 35.16(b)(1), (3), V.A.C.C.P.

[9] In determining whether a potential juror was properly excused for cause due to his or her views on capital punishment, it must be determined if the trial court abused its discretion in its action regarding the veniremember in light of the record. Only where the record supports the trial court's determination that those views would prevent or substantially impair that veniremember's duties in light of the instructions and oath, will the decision made by the trial court be undisturbed on appeal. *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); *Hernandez v. State*, 757 S.W.2d 744 (Tex.Cr.App.1988); *Sharp v. State*, 707 S.W.2d 611 (Tex.Cr.App.1986) cert. denied, — U.S. ——, 109 S.Ct. 190, 102 L.Ed.2d 159 (1988).

In the present case, after having had the process explained to him, Graves stated that regardless of what the evidence proved he would answer one of the punishment questions "no" so as to not be a participant in the rendering of a death sentence. Graves, in his responses, went on to illustrate that if faced with such a decision as between the oath and his conscience, he would prefer not to take the oath rather than swear to perform a duty which he could not undertake.

During examination by appellant, Graves stated that he would follow the law in deciding the three punishment issues. Subsequently appellant was asked the following question:

"Q. Okay. I kind of keep going back, I guess, to the answers of the—if you were a Juror and asked to deliberate on the punishment on a capital crime, again, it would be in the instance where a person was convicted of a capital crime and you were talking about punishment and that being punishment set by the answers to these three questions, could you, in fact, follow your oath to listen to the evidence and decide on the evidence and weigh the evidence and then put an answer—then go ahead and answer these three questions as the evidence indicated?

"A. Yes, but if it meant answering yes to all three, I couldn't because I really don't feel like the death penalty is appropriate."

[10, 11] The mere fact that a prospective juror states that they would not, under any circumstances, answer the punishment questions in the affirmative for any reason, is not, in and of itself, sufficient to disqualify a juror. *Hernandez v. State*, 757 S.W.2d 744 (Tex.Cr.App.1988). However, after review of the record we find that it clearly reflects a "substantial likelihood that [Graves would] balk at the task or falsify an answer" and therefore the trial court committed no error in finding that Graves was unqualified to be a juror. *Id.* It is evident that Graves' views on crime and punishment would substantially impair his abilities to carry out his duties as a juror in accordance with the oath and instructions necessitated by Texas law. *Id.* at 754. Therefore, as the trial court committed no error, appellant's fourth point of error is overruled.

Appellant in his first point of error alleges that the trial court *sua sponte* excused veniremember Walker over his objections and without a challenge for cause by either party.

Although this is true, appellant mischaracterizes the trial court's action by calling it a *"sua sponte"* excusal. Cf. *Green v. State*, 764 S.W.2d 242 (Tex.Cr.App.1989); *Nichols v. State*, 754 S.W.2d 185 (Tex.Cr.App.1988) cert. denied, — U.S. ——, 109 S.Ct. 819, 102 L.Ed.2d 808 (1989); *Rougeau v. State*, 738 S.W.2d 651 (Tex.Cr.App.1987) cert. denied — U.S. ——, 108 S.Ct. 1586, 99 L.Ed.2d 901 (1988); *Moore v. State*, 542 S.W.2d 664 (Tex.Cr.App.1976) cert. denied 431 U.S. 949, 97 S.Ct. 2666, 53 L.Ed.2d 266 (1977). The Texas Code of Criminal Procedure provides that once a juror is sworn to answer truthfully to the questions to be asked during voir dire, "the court shall then hear and determine excuses offered by prospective jurors for not serving as a juror and if sufficient, discharge those members of the venire." Articles 35.02 and 35.03, V.A.C.C.P.

In the case before us, the State, in the course of examining Walker, inquired into several matters including whether she had responded affirmatively to a question regarding the care and custody of a child

under the age of ten years. Walker explained that the child was her grandson and that he stayed with her during the school year so he may attend school locally rather than in Grand Prairie where his mother lived.[3] She stated that he was eight years old and was currently being cared for by a friend while she was at the courthouse for this proceeding. The attorneys elicited from Walker that although her friend could care for the child during the course of the trial and although she characterized her grandson as very independent, if the trial lasted for the expected one to four weeks, she would have a difficult time keeping her mind on the trial. She stated that she wanted to do her civic duty and would like to be on a jury for a trial that would not be so lengthy. Veniremember Walker also stated that if she were a defendant in a criminal trial she would not want a juror who had her state of mind sitting on her jury panel.

The court then told Walker that if she wanted to be excused for these reasons that he would excuse her, if however, she wanted to serve on this jury then she may as she was qualified. The veniremember chose not to serve and asked to be excused. The court excused Walker, expressly pursuant to Article 35.03, over appellant's objection.

The objections raised by appellant began with an assertion that the trial court and prosecutor were seeking to exclude Walker because she was black, the same race as the appellant. That the testimony elicited by the State was intended for the sole purpose of having this veniremember excused because she was black. Additionally, appellant objected to the fact that the trial court was excusing her when there was no valid challenge for cause from either party and that the court was doing so based on her testimony which appellant felt was not sufficient to justify her excusal. We disagree.

[12, 13] As previously set out, Article 35.03 provides that it shall be the court that hears and determines the sufficiency of excuses for not serving as a juror. As the legislature has placed this responsibility and discretion upon the trial judges of this state, review of their decisions on appeal shall be whether such a decision constituted an abuse of discretion. That is, does the record reasonably reflect a tendency to support the trial court's holding. Where the record so reflects, decisions as to the sufficiency of excuses and the propriety of excusals rendered by trial courts shall not be disturbed on appeal. However, we feel that the exercise of this authority by trial judges should be jealously guarded and relied upon, not by the parties, but by the judges as a last resort for excusing, what would otherwise be, a proper juror. *Cf. Nichols v. State*, 754 S.W.2d 185 (Tex.Cr.App.1988) cert. denied, — U.S. —, 109 S.Ct. 819, 102 L.Ed.2d 808 (1989); *Rougeau v. State*, 738 S.W.2d 651 (Tex.Cr.App.1987) cert. denied — U.S. —, 108 S.Ct. 1586, 99 L.Ed.2d 901 (1988); *Moore v. State*, supra. Appellant's first point of error is overruled.

Appellant's fifth point of error alleges trial court error in overruling appellant's challenge for cause as to veniremember Kiker on the grounds that Kiker could not consider age as a mitigating factor at punishment. See Article 35.16(c)(2), V.A.C.C.P.

[14] Appellant misconstrues the law when he characterizes Kiker's inability to consider age as a mitigating factor as a prejudice against the law applicable to the appellant's case. Although not cited in the briefs of either party, this Court has recently determined that it is not error for a trial court to overrule a challenge for cause where it is shown that a juror will not or may not give a particular variety of "mitigating evidence" any consideration. *Cuevas v. State*, 742 S.W.2d 331 (Tex.Cr.App. 1987) cert. denied — U.S. —, 108 S.Ct. 1488, 99 L.Ed.2d 716 (1988); *Cordova v. State*, 733 S.W.2d 175 (Tex.Cr.App.1987), cert. denied — U.S. —, 108 S.Ct. 2915, 101 L.Ed.2d 946 (1988).

3. Although it appears that the excuse raised by veniremember Walker is more along the lines of an exemption as per Section 62.106(2) of the Government Code, which states that a person qualified to serve as a juror may nonetheless establish an exemption from service if he has legal custody of a child or children younger than 10 years of age and that service requires leaving them without adequate supervision. We find that this exemption was not raised, therefore, we do not decide the applicability of the exemption, i.e., "legal custody," to grandmothers, such as veniremember Walker.

The United States Supreme Court has not yet mandated that jurors *must* give any amount of weight to any particular piece of evidence that might be offered in mitigation of punishment. *Cordova*, 733 S.W.2d at 189. What the Court has decided is that the factfinder must not be precluded or prohibited from considering any relevant evidence offered in mitigation of the punishment to be assessed, or in answering the punishment questions. *Cordova* at 189, citing *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). See also *Cuevas*, 742 S.W.2d at 345. What this means is the factfinder must be allowed to hear the evidence and to act upon it. *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

In Texas, this mitigating evidence is admissible at the punishment phase of a capital murder trial. See Article 37.071, V.A.C.C.P. Once admitted, the jury may then give it weight, if in their individual minds it is appropriate, when answering the questions which determine sentence. *Adams*, 448 U.S. at 46, 100 S.Ct. at 2526. However, "[t]he amount of weight that the factfinder might give any particular piece of mitigating evidence is left to 'the range of judgment and discretion' exercised by each juror." *Cordova* at 189, quoting *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); *Cuevas*, 742 S.W.2d at 346.

During the voir dire examination of Kiker, she stated that as between a nineteen year old defendant with the maturity of a twenty-five year old versus a nineteen year old defendant with the maturity of a twelve year old, that as to punishment these people should be treated the same.

It was this inability to consider "either mental age or physical age" as a mitigating factor that appellant based his challenge. The trial court overruled appellant's challenge for cause finding that it was not a proper ground for disqualification.

[15, 16] The mere fact that a prospective juror, during voir dire, acknowledges that in their mind such evidence deserves little or no weight, does not create a sustainable challenge for cause under Article 35.16. See *Cuevas*, 742 S.W.2d at 345; *Cordova*, 733 S.W.2d at 189. We find the trial court committed no error in its ruling. Appellant's fifth point of error is overruled.

Lastly, appellant's third point of error alleges the trial court erroneously granted the State's challenge for cause to veniremember Guzman. Appellant asserts that it was not clear from the record that Guzman could not read or write.[4] Article 35.16(a)(11), V.A.C.C.P.

First, it has long been the law of this state that the statutory requirement that jurors be able to read and write meant something more than the mere ability to "write his name and nothing more." *Hernandez v. State*, 506 S.W.2d 884 (Tex.Cr.App.1974). Rather, the prospective juror should possess the ability to express their ideas in words upon paper. *Hernandez* at 887 citing *Johnson v. State*, 21 Tex.App. 368, 17 S.W. 252 (1886). This is a determination which rightfully belongs to the trial court and, absent an abuse of discretion, such a finding will not be disturbed on appeal. *Garcia v. State*, 581 S.W.2d 168 (Tex.Cr.App.1979) (vacated and remanded on other grounds, 453 U.S. 902, 101 S.Ct. 3133, 69 L.Ed.2d 988 (1981)).

4. The State was sustained on two separate challenges for cause of veniremember Guzman. The first regarding her ability to read and write and the second that she possessed a conscientious scruple against infliction of the death penalty as well as a bias or prejudice against the law upon which the State was entitled to rely. Article 35.16(b)(1), (3), V.A.C.C.P. Appellant objected to both challenges. As we find the first challenge under Article 35.16(a)(11) proper, we need not address the merits of the second challenge for cause sustained by the trial court and complained of herein by appellant.

During the State's examination of prospective juror Guzman, she stated that she could read but not very well since the extent of her education went no further then the fourth grade. In regards to the juror questionaire, Guzman stated that there were words that she did not understand, she did not know how to explain the answers she wished to express, that she "did not know how to put it." Guzman testified she could write but could not spell some of the words in the answers she wanted to put down so she would just leave those questions blank.

Guzman further testified specifically as to the charge that would be given in this case that if it contained "big words" then she would not be able to read and understand the charge. When asked about the three special punishment questions she stated she could read and understand some of them but did not understand the rest. She could not pronounce nor did she know what the word "deliberate" meant or what was the import of that part of the second question regarding "continuing threat to society", although she could read at least the first part of the question. She further stated that she did not know what it meant to "do something deliberately" that she had never seen the word until she saw the charge. Veniremember Guzman further testified that although she could read the instructions, it might however take her as many as five readings before she would be able to answer one question. She stated she would probably still not understand the questions and therefore would have to have somebody explain their meaning to her. Before ruling upon the State's challenge for cause pursuant to Articles 35.16(a)(11), (b)(1), (3), the court asked Guzman the following question:

"The Court: In talking about intentional. let me read this to you. A person acts intentionally or with intent with respect to the nature of his conduct or to a result of his conduct when it is his conscious desire to engage in the conduct or cause the result. Do you know what that means?

"Veniremember Guzman: No, sir."

The court then sustained the State's challenge for cause on all grounds raised over appellant's objections.

[17] The record more than adequately reflects that Guzman, having obtained only a fourth grade education, could not satisfy the statutory requirement of having the ability to read and write. It is clear that she did possess rudimentary grammatical skills, however, these in and of themselves, will not satisfy the statutory requirement. *Hernandez v. State*, 506 S.W.2d 884 (Tex.Cr.App.1974). Given the fact that the trial court found Guzman's abilities to be in question, we find from the record sufficient evidence which supports the trial court's decision and therefore, the trial court did not abuse its discretion in sustaining the State's challenge for cause under Article 35.16(a)(11), V.A.C.C.P. Appellant's third point of error is overruled.

We, therefore, affirm appellant's conviction and sentence of death.

CLINTON, J., finds the majority is creating a new unsupported rule for reviewing exercise of discretion and therefore joins only the judgment of the Court.

TEAGUE, J., dissents.

DUNCAN, J., not participating.

Ex parte Robert Sammy BROWN.

No. 70700.

Court of Criminal Appeals of Texas, En Banc.

June 21, 1989.

Defendant was convicted in the Criminal District Court, Tarrant County, L. Clifford Davis, J., of attempted murder, and defendant applied for writ of habeas corpus. The Court of Criminal Appeals, W.C.

APPENDIX B

DORSEY LEE JOHNSON, JR., Appellant

No. 69,750 vs. Appeal from SCURRY County

THE STATE OF TEXAS, Appellee

OPINION ON APPELLANT'S
MOTION FOR REHEARING

Appeal was taken from a conviction for capital murder.[1] After finding appellant guilty, the jury returned affirmative findings to the statutory special issues.[2] Punishment was assessed by the trial court at death.

On original submission, this Court overruled appellant's points of error and affirmed his conviction.[3] In his motion for rehearing, appellant presented five grounds for rehearing. This Court granted only appellant's fifth ground, in which he complained the trial court erred when it failed to instruct the jury at punishment that they could consider appellant's age, or other factors, as a mitigating circumstance. Appellant cited Penry v. Lynaugh,[4] as support for this ground for rehearing.

At trial during punishment, appellant requested an additional instruction on consideration of mitigating evidence. The trial court agreed, and gave this instruction to the jury:

> "In determining each of these Issues, you may take into consideration all the evidence submitted to you in the trial of this case, whether aggravating or mitigating in nature, that is, all the evidence in the first part of the trial when you were called upon to determine the guilt or innocence of the Defendant and all the evidence, if any, in the second part of the trial wherein you are called upon to determine the answers to the Special Issues."

The trial court did not specifically apply this instruction to the factor of appellant's youthful age, nor did appellant request the trial court to do so. In addition, this instruction did not present

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[1] TEX. PENAL CODE § 19.03 (a)(2).

[2] TEX.CODE CRIM.PROC. ANN. art. 37.071.

[3] Johnson v. State, 773 S.W.2d 322 (Tex.Cr.App. 1989).

[4] Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

consideration of mitigating evidence as a third special issue upon which the jury could choose to sentence appellant to life imprisonment.[5] It is in this motion for rehearing that appellant has raised for the first time the failure of the trial court to instruct the jury that it could consider appellant's age in mitigation of his punishment.

We will overrule this ground for rehearing for two reasons.

The only mitigating evidence mentioned by appellant in this motion for rehearing is his age at the time of the commission of the instant offense. Appellant does not even state what his age was at the time of the commission of the instant offense. From the decision of this Court on original submission, wherein we described the voir dire of venireperson Kikar, we could assume that appellant's age was nineteen when the instant offense was committed.[6]

Because age is the only mitigating factor mentioned by appellant, we will review the instant case from the perspective of determining if the trial court's instructions at punishment permitted the jury to consider and give mitigating effect to appellant's youthful age when he committed the instant offense.[7]

In Lackey v. State,[8] this Court held that the defendant's youth was relevant to a proper resolution of the concerns of special issue two.[9] If a juror believed that appellant's violent actions were a result of his youth, that same juror would naturally believe that appellant would cease to behave violently as he grew older. Such a juror would be able, under special issue number two,

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[5] See TEX.CODE CRIM.PROC.ANN. art. 37.071, Sec. 2 (e) & (f) (Vernon's 1991).

[6] See Johnson v. State, 773 S.W.2d, at 331.

[7] Penry v. Lynaugh, 109 S.Ct. 2934; Black v. State, 816 S.W.2d 350 (Tex.Cr.App.1991).

[8] Lackey v. State, 819 S.W.2d 111, at 134 (Tex.Cr.App.1991).

[9] See TEX.CODE CRIM.PROC.ANN. art. 37.071 (b)(2).

to express a reasoned moral response to applicant's youth. We find, in the instant case, that the art. 37.071 instructions did not restrict the instant jury from considering and giving mitigating effect to the evidence of appellant's age.[10]

We conclude that the trial court did not err when it did not specifically instruct the jury to consider and give effect to appellant's age at trial, since the jury was able to express a reasoned moral response to appellant's mitigating evidence within the scope of the art. 37.071 instructions given to them by the trial court. We hold article 37.071 was not unconstitutionally applied to appellant. Appellant's fifth ground for rehearing is overruled.

Appellant's motion for rehearing is denied.

PER CURIAM

(Delivered May 27, 1992)

En Banc

Do Not Publish

Clinton, J., dissents

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[10] Lackey v. State, supra. See also Graham v. Collins, 950 F.2d 1009 (1992).

Supreme Court, U.S.
FILED
OCT 13 1992
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No. 92-5653

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1992

DORSIE LEE JOHNSON,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the special issues submitted at the punishment phase permitted the jury to give mitigating effect to the fact that Johnson was nineteen years old at the time of the offense.

2. Whether the trial court properly denied Johnson's challenge for cause to Susan Kiker, because her views would not have prevented or substantially impaired her performance as a juror in Johnson's case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Course of Proceedings and Disposition Below	2
B. Statement of Facts	2
SUMMARY OF ARGUMENT	6
REASONS FOR DENYING THE WRIT	7
I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.	7
II. JOHNSON HAS NO VIABLE CLAIM UNDER *PENRY* BECAUSE HIS MITIGATION EVIDENCE, AS PRESENTED AT TRIAL, WAS RELEVANT TO THE SPECIAL ISSUES AND DID NOT REFLECT A REDUCED CULPABILITY BEYOND THE SCOPE OF THOSE ISSUES.	7
III. TO THE EXTENT JOHNSON'S CLAIM OF IMPROPER DENIAL OF DEFENSE CHALLENGES FOR CAUSE IS PROPERLY BEFORE THE COURT, IT IS WITHOUT MERIT.	14
A. Johnson's claim that venire member Barbee and Lammert should have been excluded for cause is not properly before the Court because it was neither properly presented nor decided by the state court below.	14

TABLE OF CONTENTS (continued)

		Page
B.	***Juror Kiker's views did not disqualify her from service on the jury because they would not have prevented or substantially impaired her performance as a juror in accordance with her instructions and her oath.***	16
CONCLUSION		18

TABLE OF AUTHORITIES

Cases	Page
Adams v. Texas, 448 U.S. 38 (1980)	17
American Surety Co. v. Baldwin, 287 U.S. 156 (1932)	15
Barefoot v. Estelle, 463 U.S. 880 (1983)	10
Beck v. Washington, 369 U.S. 541 (1962)	15
Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987)	15
Boyde v. California, 494 U.S. 370, 110 S. Ct. 1190 (1990)	11,12
California v. Brown, 479 U.S. 538 (1987)	10,11
California v. Ramos, 463 U.S. 992 (1983)	10
Cardinale v. Louisiana, 394 U.S. 437 (1969)	14
Cordova v. Collins, 953 F.2d 167 (5th Cir.), *cert. denied & stay denied*, ___ U.S. ___, 112 S. Ct. 959 (1992)	13
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983)	15
Forbes v. State Council, 216 U.S. 396 (1910)	15
Franklin v. Lynaugh, 487 U.S. 164 (1988)	9,11
Godchaux Co., Inc. v. Estopinal, 251 U.S. 179 (1919)	15
Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992) (en banc)	9,12,13
Gregg v. Georgia, 428 U.S. 153 (1976)	9,10
Hanson v. Denckla, 357 U.S. 235 (1958)	15
Hathorn v. Lovorn, 457 U.S. 255 (1982)	15
Heath v. Alabama, 474 U.S. 82 (1985)	14
Herndon v. Georgia, 295 U.S. 441 (1935)	15
Hill v. California, 410 U.S. 797 (1971)	14
Illinois v. Gates, 462 U.S. 213 (1983)	14
Jurek v. Texas, 428 U.S. 262 (1976)	8,12,13

TABLE OF AUTHORITIES (continued)

	Page
Lockett v. Ohio, 438 U.S. 586 (1978)	9,11
Morgan v. Illinois, ___ U.S. ___, 112 S. Ct. 2222 (1992)	16,17
Penry v. Lynaugh, 492 U.S. 302 (1989)	6,7,11
Radio Station WOW v. Johnson, 326 U.S. 120 (1945)	15
Rochelle v. State, 791 S.W.2d 121 (Tex. Crim. App. 1985)	16
Saffle v. Parks, 494 U.S. 484, 110 S. Ct. 1257 (1990)	10,12
Simmerman v. Nebraska, 116 U.S. 54 (1885)	15
Skipper v. South Carolina, 476 U.S. 1 (1986)	10
Tacon v. Arizona, 410 U.S. 351 (1973)	14
Tison v. Arizona, 481 U.S. 137 (1987)	10
Wainwright v. Witt, 469 U.S. 412 (1985)	16
Williams v. New York, 337 U.S. 241 (1949)	9

Constitutions, Statutes and Rules

U. S. Const., amend. VI	2
U. S. Const., amend. VIII	2
U. S. Const., amend. XIV	2
28 U.S.C. § 1257(1)	2
TEX. CODE CRIM. PROC. ANN. art. 35.16(c)(2) (Vernon Supp. 1991)	16
TEX. CODE CRIM. PROC. ANN. art. 37.071(b)	2,8
Sup. Ct. R. 10.1	7

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OCTOBER TERM, 1992

DORSIE LEE JOHNSON,
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THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent,[1] and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas affirming Johnson's conviction and sentence is published at 773 S.W.2d 322 (Tex. Crim. App. 1989); the court denied Johnson's motion for rehearing in an unpublished opinion delivered on May 27, 1992. A copy of the published opinion is attached to the petition as Appendix A, and a copy of the unpublished opinion on denial of rehearing is attached to the petition as Appendix B.

[1] For clarity, Respondent will be referred to as "the state" and Petitioner Dorsie Lee Johnson as "Johnson".

JURISDICTION

Johnson seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Johnson bases his claims on the sixth, eighth, and fourteenth amendments to the United States Constitution. Also implicated is the Texas capital sentencing statute in effect at the time of Johnson's trial, TEX. CODE CRIM. PROC. ANN. art. 37.071(b), (e) (Vernon 1981).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

By an indictment filed in the 132nd Judicial District Court of Scurry County, Texas, Cause No. 5575, Johnson was charged with the capital offense of intentional murder of Jack Huddleston during the course of a robbery (Tr. 2). He entered a plea of not guilty and was tried before a jury. On November 12, 1986, the jury found Johnson guilty of capital murder (Tr. 114). A separate sentencing hearing ensued, and on November 14, 1986, the jury returned affirmative answers to the two special issues submitted pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Tr. 119-20). In accordance with Texas law, the trial court assessed Johnson's punishment at death by lethal injection (Tr. 122).

Johnson directly appealed to the Court of Criminal Appeals of Texas, which affirmed the conviction and sentence in an opinion delivered on June 21, 1991. *Johnson v. State*, 773 S.W.2d 322 (Tex. Crim. App. 1991). In an unpublished opinion, the state appellate court on May 27, 1992, denied Johnson's motion for rehearing.

B. Statement of Facts

The facts pertaining to Johnson's commission of the capital murder are adequately set out in the opinion of the Court of Criminal Appeals.

> In the early morning hours of Sunday, March 23, 1986, [Johnson] and his accomplice, Amanda Miles, decided to commit a robbery at the Allsup's convenience store in Snyder. After planning the crime, deciding that there should be no witnesses, and waiting for the store to clear of customers, the pair entered the store. On the pretext of wanting a particular item, [Johnson] lured Huddleston, the clerk, back to the cooler where he was told this was a robbery and to lie face down on the floor. [Johnson] then shot the clerk in the back of the neck with a .25 caliber pistol, killing him. Amanda Miles emptied out the cash drawer taking approximately $160.00 (one hundred sixty dollars). Two cartons of cigarettes were also taken.
>
> [Johnson] was arrested in April for a subsequent robbery and attempted murder of a store clerk in the neighboring town of Colorado City. It was in the course of investigating this latter offense that [Johnson] confessed to the capital offense committed in Snyder.

Johnson v. State, 773 S.W.2d at 324.

The facts pertaining to Johnson's challenge for cause of juror Susan Kiker are as follows. When questioned by the prosecutor during individual jury selection, Kiker stated that a life sentence might be appropriate in a capital case, depending upon the facts adduced (SR X 4065-66), and that she would not automatically answer the special issues affirmatively in the event Johnson were convicted of capital murder (SR X 4072). Subsequently, the following colloquy occurred between Kiker and defense counsel:

> Q: Okay. Do you think a person who is in their teenage years by their actions during their teenage years absolutely predicts the way they are going to be twenty or thirty or forty years from now -- from then, rather?
>
> A: Most of the time, yes. I know that as I was a teenager, I'm pretty much the same as an adult.

Q: Is that something -- is that opinion you have based strictly on you individually? You think that is something that you have learned from your own ---

A: Or have seen others.

Q: That you have formed an opinion through psychology or sociology courses?

A: No, I didn't get that opinion through my sociology or psychology courses, I don't think. Yes, people can change. What they have been like as a young adult does not necessarily mean that that's the way they'll be in their older adult years. But, like I said, most -- in my opinion most of the time they are.

Q: So as to that question if you heard evidence of other criminal acts, you would -- are you saying that you just would automatically vote yes?

A: No, sir. No, that's not what I said.

Q: Okay. I don't mean to -- I would rather ask you what you mean and let you tell me.

A: Right. No, that's not what I meant. Like I said, anyone can change. As I said before, if it's a first time offense, even if it's capital murder, that doesn't necessarily mean they'll ever do it again.

Q: Okay. Well, if in a case you heard evidence of other individual bad acts, the same type of crime, would you say a person could change?

A: You're asking me if he's -- if this person has committed bad acts all through his life, if he can change?

Q: Well, again, you know, if you have a young person and if you heard -- if you had already found him guilty of one crime and you heard evidence of other similar crimes ---

A: You know, a younger person -- just because he's a younger person, say fifteen or nineteen or twenty, doesn't necessarily mean his maturity is all that young

or that old. And, you know, a younger person may have the mind of a very mature adult. So I can't say that just because he was young and in his younger years he might not ever commit another crime because I know a lot of forty year old men that are still very young.

Q: You would agree that ---

A: Very young.

Q: Yes, ma'am. You would agree that he could also ---

MR. ARMSTRONG: He is talking about you.

Q: (By Mr. Conrad) Have a very immature mind ---

A: Yes.

Q: --- for whatever age, nineteen, eighteen, that they might have the maturity of a twelve year old, for instance?

A: That's right.

Q: Do you think that type person should be treated the same as the person who was nineteen years old and had the maturity of a twenty-five year old? Talking about a person who, say, was nineteen years old and had the maturity level of a twelve year old?

A: Should be treated the same? In what instance? This instance right now?

Q: In the punishment phase?

A: A punishment type situation, yes, I do. I think so. I think they should be treated the same.

(SR X 4084-87). Defense counsel challenged for cause on the basis that "the Juror testified that she could not -- did not consider -- could not consider age, basically, as a mitigating factor in deciding punishment; that, basically, all ages, either mental age or physical age, should be dealt with the same punishment." The trial

court initially indicated that this was not a proper basis for exclusion. However, when defense counsel further argued that youth was a mitigating factor upon which the defense is entitled to rely, see TEX. CODE CRIM. PROC. ANN. art. 35.16(c)(2), the trial court ruled that Kiker was not disqualified from jury service (SR X 4105).

SUMMARY OF ARGUMENT

Johnson advances no special or important reasons that warrant the Court's exercise of its certiorari jurisdiction. Johnson's claim under *Penry v. Lynaugh*, 492 U.S. 302 (1989), is without merit. The two statutory special issues submitted to Johnson's jury provided it with the requisite fair vehicle for giving mitigating effect to evidence that Johnson was nineteen years old when he committed the capital murder.

Johnson's claim that venire members Barbee and Lammert should have been excluded for cause is not properly before the Court for review on writ of certiorari. Those arguments were first presented to the highest state court in a motion for rehearing, and the state court neither entertained nor decided the claim. To the extent Johnson contends that the trial court erred in overruling his challenge for cause of Susan Kiker, the claim is unmeritorious. The record reflects that Kiker's views would not have prevented or substantially impaired her performance as a juror in Johnson's cause, and, consequently, Johnson was not entitled to exclude her from service.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THE COURT'S ATTENTION.

Rule 10.1 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Johnson has advanced no special or important reason for the Court to exercise its certiorari jurisdiction in this case, and none exists.

II.

JOHNSON HAS NO VIABLE CLAIM UNDER *PENRY* BECAUSE HIS MITIGATION EVIDENCE, AS PRESENTED AT TRIAL, WAS RELEVANT TO THE SPECIAL ISSUES AND DID NOT REFLECT A REDUCED CULPABILITY BEYOND THE SCOPE OF THOSE ISSUES.

Relying on *Penry v. Lynaugh*, 492 U.S. 302 (1989), Johnson contends that the Texas capital sentencing statute was unconstitutionally applied in his case because the special issues[2] did not allow the jury to give mitigating effect to his

---

[2] At the time of Johnson's trial, the sentence in a Texas capital murder trial was based upon the jury's answers to the following questions:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

relative youth of nineteen years at the time he committed the capital murder. The court below applied this Court's eighth amendment precedent to Johnson's claim under *Penry* and correctly denied relief. Johnson's mitigating evidence, as proffered at trial, was relevant to the special issues and had no relevance to his culpability beyond the scope of those issues. Under these circumstances, no supplemental mitigation instruction was constitutionally required.

Under the Texas capital sentencing scheme, the jury can give mitigating effect to any evidence that, if credited and given sufficient weight by the jury, rationally can raise a reasonable doubt on a punishment issue. In *Jurek v. Texas*, 428 U.S. 262 (1976), the Court upheld the constitutionality of the Texas death penalty scheme because, among other things, a defendant is free to ask the jury to consider, in responding to the second of two or three statutory special issues, whatever evidence of mitigating circumstances the defense can bring before it. In

> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

TEX. CODE CRIM. PROC. ANN. art. 37.071(b). The first two issues were submitted to the jury at the punishment phase of Johnson's trial (Tr. 119-20). In addition, the trial court gave the following instruction:

> In determining each of these Issues, you may take into consideration all the evidence submitted to you in the trial of this case, whether aggravating or mitigating in nature, that is, all the evidence in the first part of the trial when you were called upon to determine the guilt or innocence of the Defendant and all the evidence, if any, in the second part of the trial wherein you are called upon to determine the answers to the Special Issues.

(Tr. 117-18).

Penry, however, the Court held that if a capital defendant introduces evidence about his background, character, or the circumstances of the offense that reflects a reduced culpability, and the jury cannot give effect to the mitigating force of that evidence in responding to the special issues, the trial court must upon request provide instructions that allow the jury to give mitigating effect to the evidence. *Id.* at 320-21, citing *Franklin v. Lynaugh*, 487 U.S. 164, 185 (1988) (O'Connor, J., concurring). Following *Franklin* and *Penry*, the Texas statute maintains its facial validity, as the Court made clear that supplemental instructions are not constitutionally indispensable in every case. Accord *Graham v. Collins*, 950 F.2d 1009, 1027 (5th Cir. 1992) (en banc).

A capital defendant is entitled only to an individualized sentencing decision that is a reasoned moral response to the evidence, including mitigating evidence. The body of this Court's eighth amendment jurisprudence demonstrates that traditional and long-standing policies--society's very justifications for punishing criminals--rationalize capital sentencing and render the jury's response a reasoned and moral one. For example, in *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978), the Court relied heavily on *Williams v. New York*, 337 U.S. 241 (1949), to hold that the policy considerations that led to a prevailing practice of individualized sentencing in non-capital cases attain sufficient weight in capital cases that individualized sentencing is constitutionally indispensable. In capital cases, as in the non-capital context, individualized sentencing serves society's interests in punishing the individual for his misdeeds (retribution), preventing similar future conduct by the person convicted and others (deterrence),[3] and restoring the convict

[3] Although general deterrence is a penological justification, the Supreme Court in *Gregg v. Georgia*, 428 U.S. at 186 (opinion of Stewart, J., joined by Powell and Stevens, JJ.), noted that "[t]he value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures."

to a useful and productive place in society (rehabilitation). See *Gregg v. Georgia,* 428 U.S. 153, 183-87 (1976) (opinion of Stewart, J., joined by Powell and Stevens, JJ.). More recently, the Court reaffirmed that the Constitution does not require that the sentencer be permitted to dispense mercy based on sympathy for the defendant, even if that sympathy is a response to the mitigating evidence. "It is no doubt constitutionally permissible, if not constitutionally required, for the State to insist that the 'individualized assessment of the appropriateness of the death penalty be a moral inquiry into the culpability of the defendant and not an emotional response to the mitigating evidence.'" *Saffle v. Parks,* 494 U.S. 484, 492-93 (1990), quoting *California v. Brown,* 479 U.S. 538, 545 (1987).

Two specific sentencing considerations, a capital defendant's personal culpability and his future dangerousness, have evolved from and reflect these traditional sentencing concerns in the capital context. The absence of future dangerousness is constitutionally relevant because it relates to the traditional sentencing consideration of rehabilitation. "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of capital sentencing. . . ." *Skipper v. South Carolina,* 476 U.S. 1, 5 (1986); see also *Barefoot v. Estelle,* 463 U.S. 880, 897 (1983); *California v. Ramos,* 463 U.S. 992, 1002-03 (1983).

Likewise, the sentencer must be permitted to consider the defendant's culpability precisely because society's interest in exacting retribution for criminal conduct is, in part, a function of his level of culpability for engaging in that conduct. *Tison v. Arizona,* 481 U.S. 137, 149 (1987) (heart of the retribution rationale is that sentence be directly related to the culpability of the defendant). Accordingly, in order for aspects of the defendant's background to reflect a reduced culpability, the capital murder must be to some degree attributable to them.

> [E]vidence about the defendant's background and character is relevant *because of the belief, long held by this society,* that defendants who commit criminal acts that are *attributable* to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. . . . Thus, the sentence imposed at the penalty phase should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.

California v. Brown, 479 U.S. at 545 (O'Connor, J., concurring) (first and second emphases added, third emphasis in original); *Penry v. Lynaugh,* 492 U.S. at 319. Absent a nexus, the evidence does not reflect that the defendant is less culpable, or responsible for his conduct, than any other person, and concomitantly, the sentencer's response to such evidence cannot be a reasoned and moral response to the defendant's culpability.

While cases such as *Lockett* govern the factors the jury must be permitted to consider in making its sentencing decision, the Court never has promulgated "rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Saffle v. Parks,* 494 U.S. at 490. "States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde v. California,* 494 U.S. at 377, quoting *Franklin v. Lynaugh,* 487 U.S. at 181 (plurality opinion). Thus, while a defendant is entitled to proffer any aspect of his background, character, or offense in mitigation of a death sentence, the eighth amendment is violated only if evidence that is probative of a reduced culpability or capacity for rehabilitation cannot result in a sentence less than death.

Finally, a reviewing court should not set aside a death sentence unless there is a "reasonable probability" that the jury would have interpreted instructions to preclude effective consideration of the mitigating force of the defendant's

evidence, as that evidence actually was presented at trial. *Boyde v. California*, 494 U.S. 370, 380-84 & n.5 (1990). The Court has made clear that the Constitution does not require that the sentencer be permitted to give effect to the defendant's evidence in whatever manner or to whatever extent the defendant desires. Rather, the defendant is entitled only to *a* fair vehicle by which the sentencer can give effect to the mitigating force of his evidence. *Id.*;[4] *Saffle v. Parks*, 494 U.S. at 491-92; accord *Graham v. Collins*, 950 F.2d at 1027, 1031 n.27.

The court below correctly applied this Court's eighth amendment precedent to Johnson's claim under *Penry*. Johnson's mitigating evidence, as actually proffered at trial, was relevant to the special issues and had no relevance to his culpability beyond the scope of those issues. Under these circumstances, as in *Franklin v. Lynaugh*, no supplemental mitigation instruction was constitutionally required.

In light of the *Jurek* Court's direct reference to the Court of Criminal Appeals' statement[5] that the jury could consider the age of the defendant is

[4] For example, in *Boyde*, the defendant urged that evidence he won a dance contest in prison demonstrated an absence of future dangerousness--a factor that Boyde argued could not be given effect under California's death penalty statute. As a threshold matter, the Court refused to consider Boyde's future dangerousness argument, because he did not proffer the evidence for that purpose at the time of trial. *Boyde v. California*, 494 U.S. at 382 n.5. Rather, Boyde presented the evidence as an aspect of his good character, and the Court held that the jury could give effect to such evidence insofar as it demonstrated the crime to be an aberration from an otherwise good character. *Id.* Despite the fact that the jury did not have what was arguably the most direct vehicle for giving mitigating effect to Boyde's evidence--a future dangerousness factor--and despite the fact that the jury could not have given independent mitigating effect to this evidence if it also believed that Boyde's crime was not an aberration, the Court found no eighth amendment violation because the jury had *a* fair vehicle for giving effect to that evidence.

[5] *Jurek v. State*, 522 S.W.2d 934 (Tex. Crim. App. 1975).

answering the second issue and Jurek's relative youth at the time of the offense (twenty-two), *Jurek* necessarily stands for the proposition that a defendant's youth is adequately encompassed by the second issue's inquiry. "Limitations attributable to youth are all necessarily transitory. . . . Therefore, whatever is mitigating about youth tends to lend support to a 'no' answer to the second special issue, and its tendency to do so is essentially proportional to the degree to which the jury concludes that such factors were influential in the defendant's criminal conduct." *Graham v. Collins*, 950 S.W.2d at 1031. "To the extent that [a defendant's] criminal conduct was a product of his youth he was for that reason not only less culpable but, to the same extent, also less likely to be dangerous when no longer young." *Id.*; see also *Cordova v. Collins*, 953 F.2d 167, 170 n.2 (5th Cir.) (a transitory condition at the time of the offense may be adequately taken into account in answering the second special issue, and the exception created by *Penry* to the adequacy of the statutory issues is limited to those atypical circumstances in which a defendant experiences a uniquely severe handicap with which he is burdened through no fault of his own), *cert. denied & stay denied*, ___ U.S. ___, 112 S. Ct. 959 (1992).

Indeed, the jury could give mitigating effect to Johnson's age of nineteen years in precisely the manner urged by defense counsel. Counsel argued that the jury should consider Johnson's age as mitigating against an affirmative answer to the deliberateness issue--"did he have full realization of what he was doing and what the effect would be of what he was doing?" (SR XV 434). Counsel focused on the future dangerousness issue, emphasizing testimony that young people frequently change as they mature and outgrow youthful rebelliousness (SR XV 441-42). Counsel's overall theory respecting both issues was to portray Johnson as a young person, lured into the use of drugs by a bad crowd, who acted uncharacteristically and without reflection when he committed the offense.

Because Johnson's jury had a fair vehicle by which to give mitigating effect to his background and character evidence, his sentence comports with the requirements of the eighth and fourteenth amendments.

III.

TO THE EXTENT JOHNSON'S CLAIM OF IMPROPER DENIAL OF DEFENSE CHALLENGES FOR CAUSE IS PROPERLY BEFORE THE COURT, IT IS WITHOUT MERIT.

A. Johnson's claim that venire members Barbee and Lammert should have been excluded for cause is not properly before the Court because it was neither properly presented nor decided by the state court below.

Johnson next contends that his sixth, eighth, and fourteenth amendment rights were infringed when the trial court denied his challenges for cause to jurors Barbee, Kiker, and Lammert. As Johnson's claim pertains to Barbee and Lammert, it is not properly before the Court. Johnson first attempted to raise these assertions in a motion for rehearing filed in the Court of Criminal Appeals. Although the state appellate court granted rehearing to address Johnson's claim under *Penry v. Lynaugh*, it denied rehearing on his claim that the trial court erred in failing to excuse for cause prospective jurors Barbee and Lammert.

The cases are both legion and long-standing that the Court will not decide issues raised for the first time on petition for certiorari or appeal and that the Court will not decide federal questions not raised properly and decided in the court below. *E.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 410 U.S. 797, 805-06 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). To properly invoke the Court's jurisdiction, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at

the proper point. *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919). "[W]hen 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 (1987), quoting *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (further citations omitted).

Moreover, raising a federal question for the first time in a motion for rehearing addressed to the highest state court is insufficient to invoke Supreme Court jurisdiction unless the court below actually entertains and expressly decides the question. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); see also *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932); *Forbes v. State Council*, 216 U.S. 396 (1910); *Simmerman v. Nebraska*, 116 U.S. 54 (1885). To merit Supreme Court review, the order denying the petition must be more than a cursory recitation that the petition has been considered and denied; rather, there must be language in the order that in some way reflects that the state court "exerted its jurisdiction in such a way that the cases could have been brought here had the questions been raised prior to the original disposition." *Radio Station WOW*, 326 U.S. at 128; *Hathorn v. Lovorn*, 457 U.S. 255, 265 n.15 (1982).

Johnson has not attempted to demonstrate that his claim was properly presented to the Court of Criminal Appeals or that the state court actually passed upon it. To the contrary, Johnson concedes that the issue was raised for the first time on motion for rehearing and that the Court of Criminal Appeals declined to consider the issue. Petition at 6. In Texas, the general rule is that a defendant may seek rehearing only of issues that were presented prior to the appellate court's disposition of the case, unless the appellate court finds that the ends of justice

require consideration of a new claim. *E.g., Rochelle v. State*, 791 S.W.2d 121, 124-25 (Tex. Crim. App. 1985). The Court of Criminal Appeals adhered to the general rule when it denied rehearing instead of affirmatively entertaining the belatedly injected claim. Consequently, the issue is not properly before the Court for review on writ of certiorari.

B. Juror Kiker's views did not disqualify her from service on the jury because they would not have prevented or substantially impaired her performance as a juror in accordance with her instructions and her oath.

The only question that is properly before the Court is whether the trial court erred in overruling Johnson's challenge for cause of Susan Kiker. Johnson challenged Kiker for cause under TEX. CODE CRIM. PROC. ANN. art. 35.16(c)(2) (Vernon Supp. 1991), on the basis that she could not follow a phase of the law upon which the defense was entitled to rely--consideration of youth as a mitigating factor at the punishment phase (SR X 4085-87). Although during *voir dire*, Kiker stated that a nineteen-year-old defendant with the maturity of a twenty-five year old and a nineteen-year-old with the maturity of a twelve year old should generally be treated the same as to punishment (SR X 4087), this view did not disqualify Kiker from jury service because it would not have prevented or substantially impaired her performance as a juror in Johnson's case.

It is well established that "the State may exclude from capital sentencing that 'class' of veniremen whose views would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths." *Wainwright v. Witt*, 469 U.S. 412, 424 n.5 (1985). More recently, in *Morgan v. Illinois*, ___ U.S. ___, 112 S. Ct. 2222 (1992), the Court expressly recognized a corresponding right of capital defendants to exclude prospective jurors on the same basis. Just as the state may challenge a venire member who would in every case

vote against the death penalty, the defendant is entitled to exclude "[a] juror who will automatically vote for the death penalty in every case. . . ." *Id.* at ___, 112 S. Ct. at 2229. Translating *Morgan* to the context of Texas' capital sentencing statute, a juror "must be willing not only to accept that in certain circumstances death is [not] an acceptable penalty but also to answer the statutory questions without conscious distortion or bias." *Adams v. Texas*, 448 U.S. 38, 47 (1980).

The record reflects that Kiker was not subject to exclusion under *Morgan* and *Adams*. Kiker's general philosophy regarding criminal punishment, like a juror's mere philosophical disagreement with capital punishment, provided no basis for a challenge for cause. Kiker did not say that she felt age should not be a mitigating factor at punishment, and she was not asked such a question. However, when questioned by defense counsel regarding the second special issue,[6] Kiker's answers demonstrated her ability to consider youth as a mitigating factor and give effect to that factor during sentencing deliberations. Kiker recognized that a person's behavior as a young adult was not necessarily indicative of his future behavior. Moreover, Kiker unequivocally maintained that she would not automatically vote "yes" on the future dangerousness question even if it were shown that the defendant had committed violent acts in addition to a capital murder. Because Kiker could "apply the law [and] view the facts impartially", the trial court did not err in overruling Johnson's challenge for cause.

---

[6] Kiker was not questioned regarding her ability to consider and give mitigating effect to evidence of youth in responding to the first special issue.

CONCLUSION

For the forgoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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October 13, 1992

The Honorable William K. Suter
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

Re: *Dorsie Lee Johnson v. The State of Texas*, No. 92-5653

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine copies of Respondent's Brief in Opposition. Also enclosed is the Proof of Service Form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the post-paid envelope provided.

By copy of this letter, I am forwarding a copy of said brief to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

DANA E. PARKER
Assistant Attorney General
(512) 463-2080

DEP/kh
Enclosures
c: Scott W. Braden
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No. 92-5653

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1992

DORSIE LEE JOHNSON,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Court of Criminal Appeals of Texas

PROOF OF SERVICE

I hereby certify that on the 13th day of October, 1992, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Scott W. Braden, 1660 Cross Center Drive, Norman, Oklahoma 73019. All parties required to be served have been served. I am a member of the Bar of this Court.

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FEB 19 PAGE 66

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No. 92-5653

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DORSIE LEE JOHNSON

Petitioner,

V.

THE STATE OF TEXAS

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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22pp

QUESTIONS PRESENTED IN MR. JOHNSON'S ORIGINAL PETITION

1. Did the Texas capital sentencing statute unconstitutionally preclude the jury from giving full mitigating effect to the petitioner's youthful age [nineteen] at the time of the offense?

2. If, during voir dire in a capital case, a prospective juror states that she would not consider a teenage capital defendant's youth to be a mitigating factor in rendering a decision on punishment, should the trial judge dismiss the prospective juror for cause at the request of defense counsel?

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CASES

Ex Parte Baldree, 810 S.W.2d 213 (Tex. Crim. App. 1991) . 4

Ex Parte Bell, No. 57,898 (Tex. Crim. App., November 6, 1991) 4

Black v. State, 816 S.W.2d 350 (Tex. Crim. App. 1991) . 4

Boyd v. State, 811 S.W.2d 105 (Tex. Crim. App. 1991) . . 4

California v. Brown, 479 U.S. 538 (1987) 5

Ex Parte Earvin, 816 S.W.2d 379 (Tex. Crim. App. 1991) . 4

Eddings v. Oklahoma, 455 U.S. 104 (1982) 5, 7

Franklin v. Lynaugh, 487 U.S. 164 (1988) 5, 8, 9

Furman v. Georgia, 408 U.S. 238 (1972) 5

Ex Parte Goodman, 816 S.W.2d 383 (Tex. Crim. App. 1991) . 4

Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992) (en banc) 5

Graham v. Collins, ___U.S.___, No. 91-7580 (U.S. Sup. Ct., January 25, 1993) 2

Gregg v. Georgia, 428 U.S. 153 (1976). 5, 6

Gribble v. State, 808 S.W.2d 65 (Tex. Crim. App. 1990) . 4

High v. Kemp, 819 F.2d 988 (11th Cir. 1987) 5

Hitchcock v. Dugger, 481 U.S. 393 (1987) 7

Ice v. Commonwealth, 667 S.W.2d 671 (Ky. 1984) . . . 5

Jurek v. Texas, 428 U.S. 262 (1976) 2, 6

Lockett v. Ohio, 438 U.S. 586 (1978) 5, 6, 7

Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987) . . . 5

Ex Parte McGee, 817 S.W.2d 77 (Tex. Crim. App. 1991) . . 4

Moore v. Balkcom, 716 F.2d 1511 (11th Cir. 1983) . . 5
Penry v. Lynaugh, 492 U.S. 302 (1989) . . . . passim
People v. Frank, 798 P.2d 1215 (Cal. 1990) 5
Proffitt v. Florida, 428 U.S. 242 (1976) 6
Ramirez v. State, 815 S.W.2d 636 (Tex. Crim. App. 1991) . 4
Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977) . 6, 7
Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976) . 7
Skipper v. South Carolina, 476 U.S. 1 (1986) 7
Stanford v. Kentucky, 492 U.S. 361 (1989) 5
State v. Barber, 753 S.W.2d 659 (Tenn. 1988) 5
State v. Douglas, 800 P.2d 288 (Or. 1990) 4
State v. Farrar, 786 P.2d 161 (Or. 1990), cert. denied, 111 S. Ct. 212 (U.S. 1990) 4
State v. Guzek, 797 P.2d 1031 (Or. 1990) 4
State v. Miranda, 786 P.2d 155 (Or. 1990) 4
State v. Moen, 786 P.2d 111 (Or. 1990) 4
State v. Montez, 789 P.2d 1352 (Or. 1990) 4
State v. Nefstad, 789 P.2d 1326 (Or. 1990) 4
State v. Pinnell, 806 P.2d 110 (Or. 1991) 4
State v. Rose, 810 P.2d 839 (Or. 1991) 4
State v. Searcy, 798 P.2d 914 (Idaho 1990) 5
State v. Simonsen, 798 P.2d 241 (Or. 1990) 4
State v. Smith, 791 P.2d 836 (Or. 1990) 4
State v. Stevens, 806 P.2d 92 (Or. 1991) 4
State v. Wagner, 786 P.2d 93 (Or. 1990) 4
State v. Walton, 809 P.2d 81 (Or. 1991) 4
Sumner v. Shuman, 483 U.S. 66 (1987) 7, 8

Teague v. Lane, 489 U.S. 288 (1989) 5
Woodson v. North Carolina, 428 U.S. 280 (1976) . . passim

IN THE SUPREME COURT OF THE UNITED STATES

No. 92-5653

DORSIE LEE JOHNSON

Petitioner,

-v-

THE STATE OF TEXAS

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

This Court's recent decision in Graham v. Collins, ___ U.S. ___, No. 91-7580 (U.S. Sup. Ct., January 25, 1993), casts new light on the merits of Mr. Johnson's Petition for Writ of Certiorari. To assist the Court in resolving his Petition in light of Graham and Penry v. Lynaugh, 492 U.S. 302 (1989), Mr. Johnson supplements his Petition to bring the following matters to the Court's attention:

I.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE IMPORTANT QUESTION GRAHAM NECESSARILY LEFT UNANSWERED: WHETHER, IN THE ABSENCE OF ADDITIONAL INSTRUCTIONS, MR. JOHNSON'S JURY COULD GIVE THE MITIGATING QUALITIES OF HIS YOUTH FULL CONSIDERATION UNDER THE FORMER TEXAS "SPECIAL ISSUES."

This Court granted certiorari in Graham v. Collins, ___U.S.___, No. 91-7580, to determine whether the former Texas "special issue" questions, conditionally endorsed in Jurek v. Texas, 428 U.S. 262 (1976), without additional instructions, permitted the jury to consider and give full mitigating effect to a defendant's youth.[1] Because this Court ultimately resolved Graham without reaching the merits of his claim,[2] this important issue remains undecided. As Justice Souter has recognized, Mr. Johnson's case presents the same federal constitutional question, and no procedural barrier precludes this Court from reaching the merits.

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[1] Graham presented the question whether a State might "limit a capital sentencing jury's consideration of a seventeen-year-old defendant's youth, recognized repeatedly by this Court as a powerful mitigating factor, to answering whether he acted "deliberately" and might be dangerous in the future, and afford no other basis for taking his youth into account;" he also asked this Court to resolve whether a State could "similarly limit the jury's consideration of such a defendant's positive character traits and the unfortunate circumstances of his family background." Graham v. Collins, No. 91-7580, Petition for Writ of Certiorari.

[2] This Court denied relief in Graham because it determined that the "rule" Mr. Graham sought would not have been "dictated" by existing precedent at the time his conviction and sentence became final, and thus that any such pronouncement on federal habeas corpus could not be applied retroactively to his case. See Graham, slip op. at XXX; see generally Teague v. Lane, citee. Because this Court resolved the threshold question of retroactivity against Mr. Graham, it did not rule on the merits of his Penry challenge.

See Graham, slip op. (dissenting opinion of Souter, J., joined by Blackmun, Stevens, and O'Connor, JJ.) at 9 n.5. Accordingly, this Court should grant review to consider whether the Eighth Amendment requires that a jury weighing the fate of a youthful defendant receive additional instructions beyond the unadorned "special issues" of the former Texas scheme. As detailed infra, two independent but related principles support this Court's extension of Penry to evidence of youth. First, legal tradition (as reflected in this Court's teachings) and human experience acknowledge the paramount relevance of youth as a factor which may appropriately justify leniency. Second, this Court's Eighth Amendment precedents have consistently recognized the importance of allowing a capital sentencer fully to consider every substanial aspect of a defendant's mitigating evidence. These two compelling lines of authority require this Court to consider whether the former Texas sentencing scheme was constitutionally adequate as applied to evidence of youth.

1. The question this Court intended to address in Graham remains unresolved, and still merits this Court's plenary consideration.

This Court granted review in Graham because the substantive question presented -- whether the former Texas "special issue" questions too narrowly confined the jury's discretion to impose a life sentence based on a seventeen-year-old defendant's youth and troubled background -- directly implicated the scope of its previous decision in Penry v. Lynaugh, 492 U.S. 302 (1989). That opinion had produced striking conflicts among state and federal

courts; for example, the Oregon Supreme Court plainly read Penry as a broad rejection of the Texas "special issue" format (which Oregon's scheme duplicated), and accordingly required resentencing in almost every case. See State v. Wagner, 786 P.2d 93 (Or. 1990) (opinion on remand from this Court in light of Penry).[3] The Texas Court of Criminal Appeals, on the other hand, ironically has interpreted Penry as affecting only those cases where evidence of mental retardation was presented. See, e.g., Ex Parte Bell, No. 57,898 (Tex. Crim. App., November 6, 1991).[4] Of course, the U.S. Court of Appeals for the Fifth Circuit, in its own Graham opinion,

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[3] See also State v. Moen, 786 P.2d 111 (Or. 1990) (diminished culpability based on defendant's drinking and attempt to prevent one of the victims from obtaining drugs); State v. Farrar, 786 P.2d 161 (Or. 1990) (evidence that defendant's mother had suffered from multiple sclerosis, that his father was mentally ill and violent, and that defendant suffered from a growth disease, had to be institutionalized, repeately attempted suicide, did not learn to read and write until he was incarcerated, and abused drugs), cert. denied, 111 S.Ct. 212 (U.S. 1990); see also State v. Rose, 810 P.2d 839 (Or. 1991); State v. Walton, 809 P.2d 81 (Or. 1991); State v. Pinnell, 806 P.2d 110 (Or. 1991); State v. Stevens, 806 P.2d 92 (Or. 1991); State v. Douglas, 800 P.2d 288 (Or. 1990); State v. Simonsen, 798 P.2d 241 (Or. 1990); State v. Guzek, 797 P.2d 1031 (Or. 1990); State v. Smith, 791 P.2d 836 (Or. 1990); State v. Montez, 789 P.2d 1352 (Or. 1990); State v. Nefstad, 789 P.2d 1326 (Or. 1990); State v. Miranda, 786 P.2d 155 (Or. 1990).

[4] See also Ex Parte McGee, 817 S.W.2d 77 (Tex. Crim. App. 1991); Ex Parte Goodman, 816 S.W.2d 383 (Tex. Crim. App. 1991); Ramirez v. State, 815 S.W.2d 636 (Tex. Crim. App. 1991). The sole exception is Gribble v. State, 808 S.W.2d 65 (Tex. Crim. App. 1990) (mitigating evidence of psychosexual fantasy which, when combined with drug or alcohol consumption, caused violent behavior, required resentencing under Penry). Gribble today survives only in dissenting opinions. See, e.g., Boyd v. State, 811 S.W.2d 105, 130 (Tex. Crim. App. 1991) (Clinton, J., joined by Maloney, J., dissenting); Black v. State, 816 S.W.2d 350, 376 (Tex. Crim. App. 1991) (Clinton, J., dissenting); Ex Parte Earvin, 816 S.W.2d 379, 381 (Tex. Crim. App. 1991) (Clinton, J., joined by Maloney, J., dissenting); Ex Parte Baldree, 810 S.W.2d 213, 220 (Tex. Crim. App. 1991) (Baird, J., dissenting).

narrowed the potential reach of Penry in a manner described by four Members of this Court as "plainly at odds with [this Court's] controlling Eighth Amendment precedents." Graham, slip op. at 10 (dissenting opinion of (Souter, J., joined by Blackmun, Stevens, and O'Connor, JJ.) (citing Graham v. Collins, 950 F.2d 1009, 1027, 1029 (5th Cir. 1992) (en banc).

This basic conflict over the commands of the Eighth Amendment survives this Court's disposition of Graham, since Graham does not answer whether Penry's analysis applies to mitigating evidence other than mental retardation and childhood abuse. If anything, dicta in the majority opinion in Graham[5] only further complicates the issue and requires this Court's attention. That dicta, suggesting the "limited nature" of Penry's holding, is flatly at odds both with Penry itself and with Penry's adoption of the reasoning of Justice O'Connor's concurring opinion in Franklin v. Lynaugh, 487 U.S. 164 (1988). See Graham, slip op. at 12-13, 13 n.3; compare Penry, 492 U.S. at 318, 322. As four Justices point out in Graham, Penry "lends no support for these limitations [on the full consideration of mitigating evidence];" indeed, not just the evidence described in Penry but other "categories of mitigating fact" may exceed the scope of the narrow former "special issues." Graham, slip op. at 10, 12 (dissenting opinion of Souter, J.,

[5] The majority had previously determined that review of the merits of Graham's Eighth Amendment challenge was barred by Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion); see Graham, slip op. at 10-11 (concluding that existing precedent in 1984, when Graham's case became final, would not have "dictated" the result he sought); thus, this portion of the majority's discussion was unnecessary to its disposition of the case.

joined by Blackmun, Stevens, and O'Connor, JJ.).

In short, Franklin raised substantial doubts whether the former Texas "special issues," in the absence of supplemental instructions, continued in all cases to satisfy the commands of the Eighth Amendment after Eddings v. Oklahoma, 455 U.S. 104 (1982). See Franklin, 487 U.S. at 186 (O'Connor, J., joined by Blackmun, J., concurring). Penry confirmed this surmise and strongly implied that the "special issue" questions would require additional jury instructions to pass constitutional muster if the defendant presented any relevant mitigating evidence exceeding their scope. Graham, precluded by a procedural rule from reaching the merits of precisely such a challenge, fails to resolve this open question. This Court should grant certiorari in Mr. Johnson's case to authoritatively answer it.

2. Our legal tradition and our life experience accord youth special status as a mitigating factor.

If this Court has recognized a single mitigating factor as indispensably relevant to the choice between life and death, it is the youth of the defendant. Indeed, this Court's very first decision reaffirming the constitutionality of capital punishment after Furman v. Georgia, 408 U.S. 238 (1972), acknowledged that a capital defendant's youth would mitigate against the imposition of the ultimate penalty:

> In addition, the jury's attention is focused on the character of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against the imposition of capital punishment (e.g., his youth, ...)

Gregg v. Georgia, 428 U.S. 153, 197 (Stewart, J., joined by Powell and Stevens, JJ., announcing the opinion of the Court). Since Gregg, this Court has repeatedly emphasized the mitigating relevance of youth, and the importance of giving it the fullest consideration. In Lockett v. Ohio, 438 U.S. 586 (1978), for example, this Court struck down the Ohio capital setencing scheme as applied because, inter alia, "considerations of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision." Lockett, 438 U.S. at 608 (emphases added). Similarly, in Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court distinguished "the chronological age of a minor" from the attendant infirmities of youth, and held that a constitutional capital sentencing statute had to permit the sentencer to consider and give effect to both. See Eddings, 455 U.S. at 115-116; see also id. at 118 (O'Connor, J., concurring) ("extraordinary measures" proper to ensure reliability of sentence for youthful defendant).

Finally, although this Court has concluded that the Eighth Amendment permits the execution of juvenile defendants, it has specifically required that the sentencer first be permitted to consider the defendant's age in mitigation of punishment. Stanford v. Kentucky, 492 U.S. 361, 375 (1989). Other courts have confirmed the special status of youth as a mitigator, echoing this Court's conclusions with respect to its powerful mitigating relevance. See, e.g., State v. Searcy, 798 P.2d 914, 921 (Idaho 1990) (defendant's youth, even when crime manifested "exceptional

depravity," is "sufficient to avoid capital punishment").[6]

This Court's pronoucements reflect a broad historical and contemporary social consensus that the fact of youth itself is mitigating. The reason for this near-universal agreement is simple: while most jurors have not experienced the afflictions sometimes proffered in mitigation of a capital sentence (mental retardation, mental illness, an abused childhood, drug addiction), everyone has been young. Thus, every juror can recall -- in themselves or others -- the confusion, impulsivity, and poor judgment that may attend a young person's thought and action from adolescence into young adulthood, and appreciate why such limitations justify a sentence less than death. Exactly because nineteen-year-old Dorsie Johnson's jurors would have grasped the mitigating significance of his youth intuitively, as well as rationally, their instructions must permit them enough latitude to give effect to its every substantial mitigating aspect.

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[6] See also State v. Barber, 753 S.W.2d 659, 669 (Tenn. 1988) (jury entitled to impose lesser sentence based on youth even when defendant was 29 years old); Moore v. Balkcom, 716 F.2d 1511, 1524 (11th Cir. 1983) (age of 23 is mitigating); High v. Kemp, 819 F.2d 988, 993 (11th Cir. 1987) ("society's standards of decency" compel "consideration of an eighteen year old's youth as a mitigating factor"); People v. Frank, 798 P.2d 1215 (Cal. 1990) ("[youthfulness] may well constitute a significant mitigating factor"); Ice v. Commonwealth, 667 S.W.2d 671, 680 (Ky. 1984) ("There is no question but that [the defendant]'s young age at the time of the offense is an important [mitigating] factor in his case"); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987) (defendant's youth "is a powerful mitigating circumstance").

3. This Court's Eighth Amendment decisions have always protected a capital defendant's right to the consideration of relevant mitigating evidence

The development of this Court's capital sentencing jurisprudence in the modern death penalty era[7] reflects its recognition that the Eighth Amendment mandate of individualized sentencing requires that the sentencer be permitted to consider every substantial aspect of the defendant's character and background in deciding whether to impose death. This consideration of the unique facts and circumstances of each particular case helps ensure that the sentence imposed will express a "reasoned moral response" to both the offender and the offense. See, e.g., California v. Brown, 479 U.S. 538 (1987); Penry, 492 U.S. at 328. Only thus is the constitutional requirement of "heightened reliablity," a necessary safeguard when the ultimate penalty is available,[8] satisifed. As explained infra, this Court's systematic exposition of these principles since 1978 compels the conclusion that the former Texas statute simply does not permit a jury sufficient latitude to give mitigating effect to a teenage defendant's youth. A review of how consistently this Court has applied the central insight of its capital sentencing jurisprudence

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[7] This Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), swept away the confused tangle of state capital sentencing laws then in existence, which had resulted in such an arbitrary and capricious imposition of the ultimate sanction that the Eighth Amendment could no longer tolerate them. What may fairly be called "the modern death penalty era" began four years later, with this Court's comprehensive review of the facial constitutionality of the post-Furman statutes. See text infra.

[8] Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

from Lockett v. Ohio, 438 U.S. 586 (1978) to Penry, illustrates why this Court should grant review in Mr. Johnson's case.

The history of this Court's articulation of the requirement of individualized sentencing in capital cases, of course, does not begin with Lockett. Lockett was rooted in this Court's 1976 decisions upholding the post-Furman capital sentencing statutes of Georgia, Florida, and Texas against facial attack.[9] In particular, Lockett is immanent in Woodson v. North Carolina, 428 U.S. 280 (1976), and anticipated by Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977). A brief rexamination of those precedents will illuminate this Court's subsequent holding in Lockett, and show why Lockett dictated the result in Penry and compels application of its rule to evidence of youth.

Woodson invalidated North Carolina's post-Furman death penalty scheme, which mandated a death sentence for any person convicted of "first degree murder" as defined by statute. Woodson, 428 U.S. at 286. This Court fouund the manditory character of the punishment unconstitutional, because the statute denied the sentencer an opportunity to consider "the character and record of the individual offender and the circumstances of the particular offense" in determining whether death was the appropriate punishment. Id. at 304. Woodson thus recognized individualized sentencing as "a constitutionally indispensable part of the process of inflicting

---

[9] See Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); and Jurek v. Texas, 428 U.S. 262 (1976).

the penalty of death" in the post-Furman era. Id.[10]

The next Term, faced with another, somewhat narrower mandatory sentencing statute,[11] this Court reaffirmed and strengthened its commitment to the necessity of individualized sentencing under the Eighth Amendment:

> [I]t is incorrect to assume that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance ... are all examples of mitigating facts which might attend the killing of a peace officer and are considered relevant in other juridictions. ... [I]t is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense.

Roberts (Harry) v. Louisiana, 431 U.S. 633, 636-637 (1977) (emphasis added).

Thus by 1977 this Court had recognized that states were constitutionally required to afford individualized consideration to defendants facing the death penalty; what the Court fashioned in 1978 was a simple and easily applied rule expressing this central tenet. Acknowledging "an obligation to reconcile previously differing views," this Court fashioned the rule that remains the unifying principle of death penalty jurisprudence -- the conclusion that

> the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant profers as a basis for a sentence less than death.

Lockett v. Ohio, 438 U.S. 586, 602, 604 (1978) (notes omitted) (emphasis in original).[12]

A majority of the Court soon adopted the reasoning of the Lockett plurality. In Eddings v. Oklahoma, 455 U.S. 104 (1982), this Court again emphasized the primacy of Lockett's bright-line rule:

> By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in Lockett recognizes that a consistency produced by ignoring individual differences is a false consistency.

Id. at 107; see also id. at 114-115.

Two 1987 cases usefully illustrate this Court's unwavering adherence to the rule of Lockett, and its willingness to reexamine previously approved statutory models to ensure that they continue to conform to its mandate. First, this Court reconsidered the Florida statute it had facially approved in Profitt, to determine whether that scheme passed muster as applied under Lockett by

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[10] The Court reiterated this holding the same day in striking down Louisiana's mandatory sentencing scheme in Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976)

[11] The statute at issue mandated a death sentence for anyone convicted of murdering a police officer in the line of duty. See Roberts (Harry) v. Louisiana, 431 U.S. 633, 634-635 (1977).

[12] The reference in this passage to the "rarest kind of capital case," in which consideration of mitigating evidence might not be constitutionally required, reflects that this Court on several occasions left open the possibility that an extremely narrowly defined capital offense -- e.g., murder by a prisoner already serving a life sentence -- might justify a mandatory death penalty. When squarely faced with the issue, however, this Court firmly rejected the notion that the Eighth Amendment could permit death to be imposed without the sentencer having considered the reasons not to do so. Sumner v. Shuman, 483 U.S. 66 (1987); see text infra.

permitting the sentencer full discretion to consider and give effect to mitigating evidence. Hitchcock v. Dugger, 481 U.S. 393 (1987). Hitchcock had introduced mitigating evidence

> that as a child [he] had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that [he] had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that [he] had been a fond and affectionate uncle to the children of one of his brothers.

Hitchcock, 481 U.S. at 397. This Court noted that the Florida statute under which Hitchcock was sentenced limited "mitigating circumstances" to an enumerated list, that the jury had been so instructed, and that some of Hitchcock's mitigating evidence had fallen outside the scope of the items on the statutory list. Id. at 396-398. Justice Scalia held for a unanimous Court that such a proceeding "d[oes] not comport with the requirements of ... Lockett," and reversed Hitchcock's death sentence.[13] Id. at 399.[14]

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[13] The Court noted, of course, that the State was "not precluded from seeking to impose a death sentence upon [Hitchcock], 'provided that it does so through a new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence that is available.'" Hitchcock, 481 U.S. at 399, citing Skipper v. South Carolina, 476 U.S. 1 (1986).

[14] Thus Hitchcock, like Penry, involved a reexamination -- in light of Lockett and Eddings -- of a statute found facially constitutional at the dawn of the post-Furman era. Although in 1976 the statute approved in Proffitt had not "clearly operated ... to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor," experience demonstrated that the statute as applied had precisely such an effect in cases where the defendant's mitigating evidence did not fit neatly or exclusively into the categories enumerated by the Proffitt scheme. See Penry, 492 U.S. at 317 (quoting Lockett, 438 U.S. at 607).

Later that Term, in Sumner v. Shuman, 483 U.S. 66 (1987), the Court emphasized that even in a very narrowly defined, highly aggravated catagory -- murder by a prisoner serving a sentence of life without parole -- Lockett forbade an automatic sentence of death upon conviction. As the Court explained,

> Not only do the two elements that are incorporated in the mandatory statute serve as incomplete indicators of the circumstances surrounding the murder and of the defendant's criminal record, but they also say nothing of the [circumstances] such as the youth of the offender, . . . the influence of drugs, alcohol, or extreme emotional disturbance, and even the existance of circumstances which the offender reasonably believed provided a moral justification for his conduct.

Id. at 81-82 (citation omitted). Since such factors could reasonably support a sentence less than death notwithstanding the existence of serious aggravating evidence, the statute's silence concerning the consideration of mitigating evidence violated the Eighth Amendment. Mindful of the unbroken history of its application of the bright-line Lockett rule, this Court concluded:

> [A]ny legitimate state interests can be satisfied fully through the use of a guided discretion statute that ensures adherence to the constitutional mandate of heightened reliability in death-penalty determinations through individualized-sentencing procedures. Having reached unanimity on the constitutional significance of individualized sentencing in capital cases, we decline to depart from that mandate in this case today.

Id. at 85.

These two decisions are representative of this Court's wide-ranging enforcement of the Lockett principle, which led it to reexamine the former Texas statute a year later. Franklin v. Lynaugh, 487 U.S. 164 (1988). In Franklin, five justices of this Court expressed serious doubts about the vitality of that model, as

applied, after Lockett and Eddings. See Franklin, 487 U.S. at 186 (O'Connor, J., joined by Blackmun, J., concurring). Those doubts were confirmed a year later, when this Court held that in particular cases the former Texas special issue questions could run afoul of Lockett. Penry v. Lynaugh, 492 U.S. 302 (1989). In Penry, the Court held that the Texas statute was inadequate to permit the consideration, as mitigating, of evidence of mental retardation and childhood abuse. Penry, 492 U.S. at 323-325. The Court concluded that a reasonable juror could have determined that Penry acted "deliberately" as that term was commonly understood, that he would likely be dangerous in the future, and that his response to any provocation had been unreasonable. Penry, 492 U.S. at 322-325. At the same time, however, the Court explained that the relevance of Penry's mitgating evidence to an appropriate sentence was not exhausted by its probative relationship to the three "special issue" interrogatories. See Penry, 492 U.S. at 323-327. In other words, despite the fact that Penry's mitigating evidence did not raise a reasonable doubt concerning any one of the three special issues, a juror could still rationally have concluded that it warranted a life sentence rather than the death penalty. Penry thus recognizes that a jury's conclusion about whether a particular defendant deserves death -- based on the evidence -- may not be accurately reflected in its answers to the "special issues" of the former Texas statute. The Eighth Amendment forbids imposition of the death penalty upon such a defendant, if the sentencer has no means to prescribe a less severe punishment based

on his mitigating evidence.

This brief review illustrates how this Court's Eighth Amendment teaching, from Woodson to Penry, has refined the requirement that a capital sentencer consider the defendant's mitigating evidence before imposing sentence. The core insight of these cases, which finds its fullest expression in Penry, is that the sentencer must be empowered to give effect to every substantial aspect of a defendant's mitigating evidence -- not just those that bear on "deliberate" conduct or the possibility that a defendant may pose a "continuing threat" to society. This conclusion is especially powerful where the relevance of the mitigating evidence in question -- e.g., the defendant's youth --lies precisely at the intersection of our legal tradition and human experience. This Court should grant plenary review and confirm that nineteen-year-old Dorsie Johnson's youth could, by itself, have supported a sentence less than death, and that, had his jury been properly instructed, it could have given effect to this commonsense conclusion.

Respectfully submitted,

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No. 92-5653

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DORSIE LEE JOHNSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing **Supplement to Petition for Writ of Certiorari** were served on counsel for Respondent by placing same in United States Mail, first-class postage pre-paid, return receipt requested, addressed to: **Enforcement Division, Office of the Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas, 78711**, this 16th day of February, 1993. I further certify that all parties required to be served have been served.

Scott W. Braden by
Lynn B. Landrith with express permission
Counsel for Petitioner

Supreme Court, U.S.
FILED
MAR 22 1993
OFFICE OF THE CLERK

No. 92-5653

In The

Supreme Court of the United States

October Term, 1992

DORSIE LEE JOHNSON, JR.,

Petitioner,

v.

TEXAS

On Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

JOINT APPENDIX

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184 pp

TABLE OF CONTENTS

Page

RELEVANT DOCKET ENTRIES 1

JURY CHARGE (GUILT PHASE) 2

STATEMENT OF FACTS (PUNISHMENT PHASE) 10

PUNISHMENT PHASE EXHIBITS 108

OBJECTIONS TO JURY CHARGE (PUNISHMENT PHASE) 125

JURY CHARGE (PUNISHMENT PHASE) 145

JUDGMENT AND SENTENCE 151

OPINION OF TEXAS COURT OF CRIMINAL APPEALS, JUNE 21, 1989..... 155

OPINION OF TEXAS COURT OF CRIMINAL APPEALS ON REHEARING, MAY 27, 1992 178

ORDER OF THE SUPREME COURT OF THE UNITED STATES GRANTING CERTIORARI AND LEAVE TO PROCEED IN FORMA PAUPERIS, FEBRUARY 19, 1993..... 182

RELEVANT DOCKET ENTRIES

02/11/87	DP BEGIN	
02/17/87	TRANSCRIPT FILED	
07/29/87	SF FILED	
10/27/87	SUPP TR FILED	
05/27/88	BRIEF FILED APP	
07/26/88	BRIEF FILED STA	
12/14/88	SUBMITTED	
06/21/89	OPINION ISSD	AFFIRM
07/07/89	MANDATE ISSD	
09/01/89	RECALL MANDATE MOT APP	FILED
09/01/89	RECALL MANDATE MOT APP	GRANTED
09/11/89	MANDAT RET	
10/06/89	REHEAR FILED APP	
10/24/89	REPLY TO REHEAR STA	
11/22/89	REHEAR DISP APP	GRANTED
		N PARTICIPATING
01/17/90	SUBMITTED REHEAR	
05/27/92	OPINION ISSDREHDEN	
06/08/92	STAY MANDAT MOT TO APPFILED	
06/08/92	STAY MANDAT MOT TO APPGRANTED	

NO. 5575

THE STATE OF TEXAS	§	IN THE 132ND
VS.	§	JUDICIAL
	§	
DORSIE LEE JOHNSON, JR.	§	DISTRICT COURT OF
	§	
	§	SCURRY COUNTY,
	§	TEXAS

CHARGE OF THE COURT

MEMBERS OF THE JURY:

The Defendant, Dorsie Lee Johnson, Jr., stands charged by indictment with the offense of capital murder, alleged to have been committed on or about the 23rd day of March, 1986, in Scurry County, Texas. The Defendant has pleaded not guilty.

Our law provides that a person commits capital murder when such person intentionally kills or causes the death of another person while such person is in the course of committing or attempting to commit the offense of robbery.

A person commits murder when he intentionally or knowingly kills or causes the death of another individual.

A person commits robbery, if, in the course of committing theft, and with the intent to obtain or maintain control of property, he either (a.) intentionally or knowingly causes bodily injury to another, or (b.) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

"In the course of committing theft" means conduct that occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of theft.

"Theft", as that term is used above is the unlawful appropriation of the property of another with the intent to deprive such other person of the property.

"Appropriation" and "appropriate" as those terms are used herein, means to acquire or otherwise exercise control over property other than real property. Appropriation of property is unlawful if it is without the owner's effective consent.

"Property" means tangible or intangible personal property or a document, including money, that represents or embodies anything of value.

"Deprive" means to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner, or to dispose of property in a manner that makes recovery of the property by the owner unlikely.

"Effective consent" means assent in fact, whether express or apparent, and includes consent by a person legally authorized to act for the owner. Consent is not effective if induced by force, threats, or fraud.

"Owner" means a person who has title to the property, possession of the property, or a greater right to possession of the property than the Defendant.

"Possession" means the actual care, custody, control, or management of property.

"Attempt" to commit an offense occurs if, with specific intent to commit an offense, a person does an act amounting to more than mere preparation that tends, but fails, to effect the commission of the offense intended.

A person acts intentionally or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

"Bodily injury" means physical pain, illness or any impairment of physical condition.

3

All persons are parties to an offense who are guilty of acting together in the commission of an offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible or by both.

A person is criminally responsible for an offense committed by the conduct of another, if acting with intent to promote or assist the commission of the offense he

solicits, encourages, directs, aids or attempts to aid the other person to commit the offense.

Mere presence alone will not constitute a party to an offense.

4

Before you would be warranted in convicting the Defendant, Dorsie Lee Johnson, Jr., of capital murder, you must find from the evidence beyond a reasonable doubt not only that Dorsie Lee Johnson, Jr., the Defendant, either acting alone or as a party with Amanda Lynn Miles, on the occasion in question was engaged in the commission or attempted commission of the felony offense of robbery, if any, Jack Huddleston as defined in this charge, but also you must find from the evidence beyond a reasonable doubt that during the commission of the robbery or attempted commission thereof, if any, the Defendant, Dorsie Lee Johnson, Jr., either acting alone or as a party with Amanda Lynn Miles shot Jack Huddleston with the intention of thereby killing or causing the death of Jack Huddleston.

Unless you find from the evidence beyond a reasonable doubt that the Defendant, Dorsie Lee Johnson, Jr., acting alone or as a party with Amanda Lynn Miles on said occasion, specifically intended to kill Jack Huddleston when he shot him, if he did shoot him, you cannot convict him of the offense of capital murder.

Now, if you find from the evidence beyond a reasonable doubt that on or about the 23rd day of March, 1986,

in Scurry County, Texas, the Defendant, Dorsie Lee Johnson, Jr., acting alone or as a party with Amanda Lynn Miles, as that term has been defined, did intentionally cause the death of Jack Huddleston by shooting him with a deadly weapon, to wit: a firearm while said Defendant was then and there in the course of committing or attempting to commit the offense of robbery directed against Jack Huddleston, then you will find the Defendant guilty of capital murder.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the Defendant of capital murder and next consider whether or not the Defendant is guilty of the lesser offense of murder.

Therefore, if you find from the evidence beyond a reasonable doubt that the defendant, Dorsie Lee Johnson, Jr., on or about the 23rd day of March, 1986, in Scurry County, Texas, did then and there intentionally cause the death of Jack Huddleston by shooting him with a deadly weapon, to wit a firearm, but you have a reasonably doubt as to whether the Defendant was then and there engaged in the commission of robbery or attempted robbery of Jack Huddleston at the time of the said shooting, if any, then you will find the defendant guilty of murder, but not capital murder.

If you find from the evidence beyond a reasonable doubt that the Defendant is either guilty of capital murder or murder, under the instructions given you, but you have a reasonable doubt as to which of said offenses he is

guilty, then you should find the Defendant guilty of the lesser offense of murder.

If you have a reasonable doubt as to whether the defendant is guilty of any offense defined in this charge then you will find the Defendant "Not Guilty".

7

Our law provides that a Defendant may testify in his own behalf if he elects to do so. This, however, is a privilege accorded a Defendant, and in the event he elects not to testify, that fact cannot be taken as a circumstance against him. In this case, the Defendant has elected not to testify, and you are instructed that you cannot and must not refer or elude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against Defendant.

8

You are instructed that in arriving at your verdict, you will consider only the testimony that you have heard from the witness stand in this case and the exhibits, if any, which have been admitted into evidence and you will not consider anything else. In this connection, you are instructed that you may take with you to the jury room any and all exhibits which have been admitted by the Court in this case.

9

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.

The fact that a person has been arrested, confined, or indicted for, or is otherwise charged with the offense gives rise to no inference of guilt at his trial.

A grand jury indictment is the means whereby a defendant is brought to trial in a felony prosecution. It is not evidence of guilt nor can it be considered by you in passing upon the question of guilt of the Defendant.

The Defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt; and in case you have a reasonable doubt as to Defendant's guilt after considering all of the evidence before you, and these instructions, you will acquit him.

You are the exclusive judge of the facts proved, of the credibility of the witnesses and the weight to be given their testimony, but you are bound to receive the law from the Court which is here given to you in these written instructions, and you mut be governed thereby.

After you retire to the jury room, you should elect one of your members as your foreman. It is the foreman's duty to preside at your deliberations, vote with you and when you have unanimously agreed upon a verdict, if you do, to certify to your verdict by signing same as foreman.

After you have retired to the jury room, no one has any authority to communicate with you except the officer who has you in charge. You may communicate with this Court in writing through the officer who has you in charge. Do no attempt to talk to the officer who has you in charge, or the attorneys or the Court, or anyone else concerning any question you may have.

After you have arrived at your verdict, the foreman will certify thereto by signing the appropriate form attached to this charge as foreman.

After argument of counsel you will retire to consider your verdict.

/s/ Gene L. Dulaney
GENE L. DULANEY,
132nd District Judge
Scurry County, Texas

IN THE 132ND JUDICIAL DISTRICT COURT
IN AND FOR
SCURRY COUNTY, TEXAS

THE STATE OF TEXAS	§	
V.	§	NO. 5575
DORSIE LEE JOHNSON, JR.	§	

STATEMENT OF FACTS

VOLUME XV - PUNISHMENT PHASE

November 12, 13 & 14, 1986
Snyder, Texas

* * *

[344] DORSIE JOHNSON, SR.,

called as a witness in behalf of the Defendant, being first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, touching his knowledge upon the matters and things in controversy in said cause, testified as follows, to-wit:

DIRECT EXAMINATION

Questions by Mr. Conard:

Q. Mr. Johnson, would you tell the Jury your name and where you live, please, sir.

A. Dorsie Johnson, Sr. I live in Colorado City, 361 Sherman Street in Colorado City, Texas.

Q. And you are the father of Dorsie Johnson, Jr. -

A. I am.

Q. - who is the Defendant in this trial, are you not?

A. I am.

Q. Now, Mr. Johnson, of course, you have been here throughout most of the trial, have you not, sir?

A. Yes, sir.

Q. And you understand that the Jury has considered the evidence and has found your son guilty of committing [345] murder while in the course of a robbery here in Snyder?

A. Yes, sir.

Q. Now, you understand, don't you, sir, that what they have to consider now is what is the appropriate punishment in this case?

A. Yes, sir.

Q. Mr. Johnson, I would like to ask you some questions about Dorsie and his background that may help them in their decision. Can you tell the Jury, first, Mr. Johnson, how old Dorsie is?

A. He's nineteen years old.

Q. Was he born in Colorado City?

A. He was.

Q. How long have you lived in Colorado City, Mr. Johnson?

A. Fifty-one years.

Q. So you have lived there most of your life?

A. Yes, sir.

Q. Now, how long – well, is Dorsie's mother still alive, sir?

A. No, sir.

Q. When did she pass away?

A. October, '85.

Q. And –

[346] A. No, beg your pardon. October of '84.

Q. 1984. All right. How long were you and she married, sir?

A. Thirty-one years.

Q. And how many children did you have?

A. Four.

Q. Four kids. Were they all boys or girls?

A. Two boys and two girls.

Q. Did you live most or all of your married life in Colorado City?

A. Yes, sir.

Q. Okay. Now, Mr. Johnson, did you and your family attend church through the years?

A. Yes, sir, all the time.

Q. And can you tell the Jury where you attended church?

A. We attended church at Mount Zion Baptist Church, Colorado City.

Q. And how often did you attend church?

A. I'm there – still there two times on Sunday, sometimes three, and then through the week for mid-week service. I'm a deacon in the church. I'm a Sunday School teacher in the church. I'm also Chairman of the Deacon's Board.

Q. Okay. Mr. Johnson, through Dorsie's life [347] growing up, did Dorsie go to church with you?

A. All the time since he was – since I could get him in my arms and carry him. I carried him to church all of the time.

Q. Did your other kids also go?

A. Every time one got old enough that I could get him out of the house, I carried him to church with me.

Q. Have you always attended church as much as you told us that you do now?

A. Always.

Q. And the rest of your family as well, sir?

A. With me.

Q. Did your kids and your family all – in attending church did you all have a Sunday School in your church?

A. Yes, sir, Sunday School. Yes.

Q. Did the kids go to Sunday School?

A. When I went to church, they went with me. We always went to Sunday School, morning service and night service, BTU, Baptist Training Union in the evening.

Q. Until Dorsie was put in jail last April – well, first, was he still living with you until last April Mr. Johnson?

A. He was living with me at that time, yes, in April.

[348] Q. Had he lived anywhere else before that time in the past couple of years?

A. Yeah, he had been in Waco.

Q. Would you tell the Jury why he was in Waco?

A. His mother moved to Waco about '79 or '80 and she – well, she had a stroke down there. Then he wanted to go down there where she was and he moved down there.

Q. Can you tell the Jury why she moved to Waco, Mr. Johnson?

A. Well, we separated.

Q. And did any of the other kids go down there to be with her?

A. They stayed with me for awhile. Well, see, the other kids had grown up. They had already gone. And my daughter Venita, she growed up. She left and went down there, too. She was living down there close to her mama and her oldest sister.

Q. Did their mother need help? Was she incapacitated after her stroke?

A. Yes, sir.

THE COURT: You will have to speak up, Mr. Johnson. –

[349] A. Yes, she was incapacitated.

THE COURT: – I can't hear you.

A. Yes, she was incapacitated.

Q. (By Mr. Conard) You just need to speak loud enough so all of the folks on the Jury can hear you.

A. Okay. I'm sorry. She had to walk on a walker.

Q. Was that why the kids went down?

A. Some of it and some of it was because they had growed up and wanted to get away from home, I guess.

Q. Okay. Now, what about Dorsie's schooling through the years? Do you think – you were probably in the Courtroom when you heard the testimony about this school record and so forth, weren't you, sir?

A. Yeah.

Q. Can you tell the Jury what you felt about the way Dorsie did in school and his attendance?

A. Oh, he was devilish. He'd get into things. Me and him would have a big row about it. Sometimes I used my belt and tried to straighten him out and it looked like that it would because I'd get better reports on him, on his deportment.

Q. What about his grades and so forth, Mr. Johnson?

[350] A. Well, I had a meeting with the principal and also the superintendent one time and they always said that he had the potential to be an A student if he wanted to be, but he could get lazy and he could bring up some lousy grades. Then we would have it again.

Q. Did he sometimes try to make improvement in –

A. Oh, yeah, he – once we had a round, from then on the grades would go up and everything.

Q. What about his attendance in school? Did you have a problem making him go to school?

A. I didn't have a problem making him go to school.

Q. Was his attendance – did you feel that his attendance was pretty good or bad?

A. Well, if he had to miss school – you see, in his early age, he had bronchitis and when he'd go to get cold and damp, well, there was always the possibility that this would hit him. Sometimes it kept him in the hospital two or three days. He'd have to go under the oxygen tent. We kept him in the hospital. He'd be out like – but just playing hooky or like that, we didn't have that.

Q. You didn't have that?

A. No. Now, he got suspended for some of them pranks that he pulled. He got suspended for them.

[351] Q. Okay. Awhile ago you said he was devilish sometimes in school. Can you tell the Jury what you meant by that?

A. Oh, he seemed to like to always want to make somebody laugh. And whenever he would do that, well, he would be violating the rules. Then one time me and Mr. Lowrance talked about it and he said, "Sometimes he needs punishing." I said, "Well, punish him." He said, "Sometimes I feel like whipping him." I said, "Well, whip him. I do whip him." You know, he brought him to me on ten days suspension, cutting that boy on the back of the legs with that glass, and I told him I'd rather for him to tan his hide, you know, than for him to have to sit and miss school like that. But, anyway, when they brought him to me, I was working and I put him right along beside me. I said, "Buddy, you're going to work these ten days."

Q. Where were you working, Mr. Johnson?

A. I worked at the Compress, Cotton Compress. I put him right out there and give him a job. Let him work right along beside me.

Q. Was that when he was in the seventh or eighth grade. Is that correct?

A. (NO RESPONSE)

Q. About?

[352] A. I believe it was the eighth grade.

Q. Okay.

A. I believe it was.

Q. Did you talk to him about that incident, Mr. Johnson?

A. Talked to him every day.

Q. What were – how did he react to that?

A. He said he was just playing. He didn't mean to. He was just playing, that he just hit at him. He didn't think he was going to hit him, but he did.

Q. Was he sorry it happened?

A. He told me he was.

Q. Do you remember this other incident that you probably heard about the boy that –

A. Rocky.

Q. – with the bottle?

A. Uh-huh.

Q. Yeah.

A. He told me it was an accident. He said he was messing with him and the boy stepped back into it.

Q. How did he feel about it happening?

A. Well, he and Rocky were good friends and after that, they were good friends.

Q. Did he ever tell you his story about that [353] happening?

A. He said he didn't intend to do it.

Q. Did he and Rocky run around together –

A. Yeah.

Q. – after that?

A. Over at his house and Rocky would come over to our house.

Q. Did you think Rocky was afraid of Dorsie after that?

A. Didn't act like it.

Q. Mr. Johnson, you have heard some of the folks testify that Dorsie was using marijuana. I think you have heard some testimony about using cocaine.

A. Yeah.

Q. Did you know about that?

A. No, I didn't. Now, marijuana, I never saw him smoke – I never saw him smoke a cigarette. I never saw him use any of it. I never – I've never saw him take a drink. I know he did because I smelled it on him.

Q. Did you ever talk to him about it?

A. Yeah. That was the main sermon I preached to all of them: Drinking is no good. Drinking don't profit you anything. Drinking weakens your resistance. You spend but don't get nothing for your money.

[354] Q. Did you ever find out about drug usage?

A. (NO RESPONSE)

Q. Did you ever find out that he was using marijuana or any other drug?

A. You know, just on hearsay.

Q. Did you ever talk to him about that?

A. Sure, yeah.

Q. Do you remember about when you first found that out?

A. Well, I went to Waco to visit them while they were – while he were down there. My other daughter lived down there, too, and I – every chance I'd get, I'd go down there and visit. And they talked about it then after his mother died and that he might've been playing around with it and they was getting on him about it. And then after his sister died, she was killed – well, then that looked like it sort of set him off. He tried to find some relief because he was wrapped up in his mother and he was wrapped up in his older sister.

Q. Mr. Johnson, you said his mother died in October of 1984?

A. Uh, huh.

Q. When did his sister die, sir? .

A. In October of '85.

[355] Q. Is that the sister that was in Waco?

A. No. She was – lived in Dallas.

Q. In Dallas?

A. Uh-huh.

Q. Did Dorsie say he was wrapped up – did he visit her and –

A. Yeah.

Q. How did they get along together, Mr. Johnson?

A. Beautifully.

Q. Did they visit on a regular basis?

A. Well, no. She lived in Dallas. He was in Waco and I lived in Colorado City. I couldn't say.

Q. How much older was she than Dorsie?

A. She was born in '59 and he was born in '67. She would be – that would be eight years older than him.

Q. Was she always around as he was growing up until she left home?

A. Yeah.

Q. Was she a married lady, sir?

A. She was at the time when she died, yeah.

Q. What happened to her, sir?

A. She was murdered. She was shot in the back of the head.

Q. Just her?

[356] A. Her husband – her and her husband both.

Q. Did it – was this in Dallas?

A. In Dallas.

Q. Did the police find out who did it, Mr. Johnson?

A. They did.

Q. Who did it?

A. My grandson.

Q. Their child?

A. No. I got a step daughter. She had a boy just under his age. He was living with them.

Q. All right. How did Dorsie take that, Mr. Johnson?

A. Hard, very hard. He and this grandson for the last, well, nearly two years had lived together with his sister and they thought them to be very close. Well, when Dorsie come home and left him down there, he got – he got his auntie and he wanted to move to Dallas with her and get him a job up there and go to work and which he did. And then things went wrong somehow. He's been punished for murdering her and her husband.

Q. The grandson?

A. Yeah.

Q. Okay. How did Dorsie take the loss of his [357] mother, Mr. Johnson?

A. His mother?

Q. Yes, sir.

A. Well, he took that hard, too, because he loved his mother. It was always a problem between me and her. He loved us both.

Q. Did he start changing any at all after these things happened, after the loss of his mother and the loss of his sister?

A. Well, sir, after the loss of his mother, I think that might've started some of it. Then after the loss of his sister, he was just devastated.

Q. How did he change, Mr. Johnson?

A. Now, I attributed it to maybe it made him grow up or something because he was always my baby. He was my little boy. And then when he changed, well, when he began changing, I contributed that to that he growed up. He was growing up, you know, and, well, I'm a man –

Q. Did he still go to church after his sister's –

A. Oh, yeah. When he came back here with me, he didn't go as often as he was – used to go, you know, as he had been going. When I got up on Sunday morning, I said "All right. Buddy, I want to see you in church. I don't [358] care anything about you being eighteen years old. I want to see you in church." "Yes, sir."

Q. Did he go usually?

A. Yeah, he'd go. He'd go one day, you know. He'd go to the morning service.

Q. Did he participate in the church activities at all?

A. He slowed up on that.

Q. What had he participated in in the past?

A. Oh, in the youth department choir, purser.

Q. You said he was always your baby. Is he the youngest of your four kids?

A. He's the youngest.

Q. Have you ever known Dorsie to hurt people intentionally as he was growing up, Mr. Johnson?

A. No. You know, he was always peculiar about – particularly about hurting people's feelings. He was always so humble, you know. People could talk down on him and everything. And around me, he was always – he wasn't always ready to bristle and fight. He was always so humble.

Q. Did he have friends growing up?

A. All the time. Somebody at the house all the time.

Q. You have heard – I think you heard some [359] folks testify about a few things he got into, I suppose, from the seventh grade forward. Did he pursue the normal activities then that a teenage boy pursues growing up?

A. To me.

Q. What things did he do in school the rest of the time, Mr. Johnson?

A. Now, he, too – he loved sports.

Q. Did he play sports?

A. Yeah.

Q. What sports?

A. Football, track. He wanted to play basketball, but he was too short. But he loved sports and he was pretty good at them, at least the coaches say he was. He was short. I've seen him run a hundred yard dash with some guys and win third place. So he was pretty good.

Q. Okay. Mr. Johnson, you understand, of course, that, don't you, that what the Jury has convicted him of is a horrible thing?

A. Yes, sir.

Q. And he is charged with doing another horrible thing in Colorado City?

A. Yeah.

Q. Do you think – what do you think could have made him do those kinds of things, Mr. Johnson?

[360] A. The only answer is the answer I get from everywhere else from every angle of life, every part of life that I know about is foreign substances, drugs. Without them, seems like in all of life that I've been able to gather from it, the way it affects not only him but everybody else. Without them, people are different. Deprive them, people are different. With them – let me say this, please. May I?

Q. Sure.

A. In my youngest days – I was about nineteen, twenty, twenty-one or twenty-two, like that, when I got out of high school – I graduated from high school. I went to work at that same compress where I was telling you about I was working at. And I got around older men. There was older men that worked down there. And they drank and they got me to understand that you take a drink every once in awhile and it makes a man out of you. Well, I thank God it didn't take me long to find out that that was wrong. I didn't get attached to it. I didn't get where I depended on it. I didn't get to the place where it altered me because I let it alone. And – but I say

from these phases of life, drugs – from all of the books I've read and studied about it, it makes you worse. It alters you. They alter your thinking. They alter your habits. They alter your control. And once you're deprived of it, I believe – they say that's the reason they go to [361] these places where they can be rehabilitated. Then if you get – if you let it alone, you can control yourself, you can behave yourself and you're a different person. Without them, you're a different person. This I know. I have experienced that. Without it, you're a different person. Your reasoning is different and everything else and that's my son and I love him. And I'd plead before President Reagan and anybody else for a chance for him. And I say lock him up, get him away from the environment and these habits and he could be a different person.

Q. Mr. Johnson, let me ask you about some of the people he ran around with in the last year or two. Were you aware of some of the people he was around the last year or two?

A. Yeah.

Q. Were you happy with them?

A. No.

Q. Why not, Mr. Johnson?

A. Same problem: Drugs, drinking.

Q. Did you talk to Dorsie about that?

A. All the time. I – I've fussed with him, argued with him. "Daddy, I'm not going to do this. All right. Daddy, I'll quit." But he –

Q. Did he get away from those folks?

[362] A. Lord oh mercy, I wish he had.

Q. Mr. Johnson, if the Jury – if Dorsie were put in the penitentiary for twenty or thirty or forty years, a life sentence, and removed from those people and removed from drugs, do you think that down the line if he ever got out, he would go back to doing the same thing that he is charged with doing here today or that he has been convicted of doing here today?

A. Like I said, he got the background and what it takes to be a decent person. Now, he's had both sides of it. He knows what it takes to make him a different person. I don't know why it would be hard to make the choice.

Q. Do you think at the age of nineteen that he is a real mature person?

A. No, no. Age of nineteen? No, sir. That, also, I find to be a foolish age. That's a foolish age. They tend to want to be macho, built-up, trying to step into manhood. You're not mature-lized for it.

Q. Mr. Johnson, is there anything else that I haven't asked you about that you think this Jury ought to hear that can help them in making their decision about Dorsie?

A. This – even at this time when he's going through this phase, he's been – at night when he come home, he always comes home between 10:30 and 11:00 o'clock or there [363] about 10:45 or ten minutes until 11:00 at night during the week. I could always know just about what time he'd be home. Most of the time I hadn't gone to bed. Most of the time I had been up looking at the T.V. He

come in, sat down and talked to me. We talked about this and that and everything and if he had been doing anything, if he had been taking any drug or using any drugs that night or anything, I couldn't tell it. And I'm not expert on it because I never was around them. But, you know, he was a normal person anytime he come in. On the weekends he stayed out a little later because he's [sic] go to parties and things like that. Along about 1:00 or 1:30 or something like that I'd hear him come in the door. "Pop, I'm home." That's the way it went.

Q. In your opinion, Mr. Johnson, do you think if he had not been using drugs, would he have done the things –

A. No, sir.

Q. – that he has –

A. It's – he just didn't have that kind of nature. He was devilish, true, but not to harm anybody like that, no.

Q. When you say devilish, do you mean mischievous?

A. Pranks.

Q. Mean?

[364] A. No, pranks. Trying to be funny. He always wanted somebody to laugh. It was funny. He'd come up and tell you, "See these shoes I got on? I went to New York and got them." Wasn't no way in the world he could've went to New York and got them. He – just like that.

Q. Mr. Johnson, you have been visiting Dorsie up here in the jail and, I guess, some here in the Courthouse –

A. Uh-huh.

Q. – during this trial –

A. Yes, sir.

Q. – since he has been in jail, haven't you?

A. Right.

Q. Have you talked to him about this crime or what happened?

A. Yeah.

Q. Has he expressed sorrow to you?

A. Oh, every time I go in there, he break down.

Q. What do you mean, sir?

A. Cry.

Q. About what?

A. He don't like to see me unhappy like this. If there's anything he could do to change it so I wouldn't have to suffer like this, he'd do it.

[365] Q. Have you ever talked to him about Mr. Huddleston?

A. No.

Q. Has he ever told you that he was sorry he did it or wishes it hadn't happened or anything like that?

A. Every time I talk to him, "Daddy, I wish I could change it. I wish it never had happened. I wish I had listened more closely to what you said and the way I was raised. I just got off, got into that stuff. It got the best of me."

Q. I guess you yourself have prayed about this, haven't you, Mr. Johnson?

A. Every night and every day.

Q. Have you and Dorsie prayed about it?

A. We've prayed together about it.

Q. Is there anything you want to tell the Jury, Mr. Johnson, that I haven't asked you?

A. I just beg the Jury to consider that somebody loves him and if they'd give him a chance to be considered, that if he was locked away, away from that environment, why, he could be rehabilitated. He would be all right. He just got off to where he got – he got off into something he couldn't handle. He didn't know how to turn it loose. The people he was around wasn't interest in him turning it loose. [366] When he gets around me, he's ashamed. He didn't want me to know that he was in that kind of condition. So he would – he conveniently concealed it. I asked him about it. "No, Daddy. No, you know I wouldn't hurt you that way." The only thing that I didn't know because I never did see him smoke, they referred to a joint. I never did see him smoke one. I've smelt it on him and I've gotten after him about it, but I never did see him smoking one. I never did see him take a drink. If I come up to where him and his friends was, if they were drinking, I never did see him. If he gets out

from around them – I just beg the Jury to consider that. If he had a chance to be locked away from it he could be a decent person.

MR. CONARD: Thank you, Mr. Johnson. Pass the witness.

[367] CROSS EXAMINATION

Questions by Mr. Armstrong:

Q. Mr. Johnson, I realize this is a difficult thing for you. Quite frankly, it is difficult for all of us. But is [sic] I understand your testimony, you are telling us that drugs and his mother's death is what changed Dorsie?

A. Contributed to it, yes, sir.

Q. All right. And, yet, you never saw him drink, you never saw him smoke marijuana. He would come in at 10:00 or 10:30 each night and you didn't know that he had been using drugs. Is that right?

A. That's right.

Q. You couldn't tell that he had been on drugs, I think, is the way you put it. Is that right?

A. (WITNESS NODS HEAD)

Q. He was never arrested and charged with possession of or the use of drugs?

A. No, not here. Not in Colorado City.

Q. What about Waco?

A. Not that I know of.

Q. All right. That is what I was talking about.

A. No, not that I know of.

Q. But when you came up among his friends, he [368] would get away from it. In essence, he did what he was doing –

A. That's right.

Q. – from you? And he would tell you, "I am not doing these things"?

A. Yes, sir.

Q. And then he would always say, "I'm going to quit." Right?

A. (NO RESPONSE)

Q. He was going to quit doing those things?

A. Well, he was talking about quit running around with the bunch he was running around with.

Q. All right. Who is the grandson that Dorsie ran around with?

A. Ronald Taplin.

Q. Taplin?

A. Uh-huh.

Q. I was saying Tarplin the other day.

A. Taplin.

Q. And he is being punished for the crime that he committed?

A. He is.

Q. You are telling me that – you tell us that you raised Dorsie in the church. You taught him what was right [369] and what was wrong.

A. Near as I could. Near as I knew how.

Q. You taught him that every person is given by God the ability to make choices between right and wrong?

A. Right.

Q. You told him that when they make those choices, they are responsible for the consequences?

A. Right.

Q. And you say he started changing after his mother died?

A. That's right.

Q. But by then he had – according to the testimony, he had already cut Fred Dakan on the legs and got him expelled from school?

A. Uh-huh.

Q. He had taken, apparently, a sharp piece of glass to another boy that supposedly was just his friend and sent him to the hospital. Did you know Rocky went to the hospital?

A. Yeah. Said he went to get stitching.

Q. Stitches, yes, sir.

A. That's what I was told.

Q. Did you know Rocky didn't tell the coach and the school people at first because he was afraid that Dorsie [370] was going to cut him again?

A. No, I didn't know that.

Q. It is in those school records, Mr. Johnson. Did they not show those to you?

A. Hu-uh.

Q. Okay. And, of course, that was before Dorsie's mother died?

A. Oh, long before then, yeah.

Q. Yeah. And then he burglarized a building, a business there in Colorado City back in 1982?

A. Now, he brought a jumpsuit back and he carried it and turned it over to the police.

Q. And then left town, didn't he?

A. (NO RESPONSE)

Q. That is when he moved to Waco, isn't it?

A. No. That's when he come back from Waco and brought that stuff back.

Q. That is what he stole from the store in Waco, isn't it?

A. No.

Q. It was in December of 1982 that he broke into the store there in Colorado City?

A. (NO RESPONSE)

Q. Mrs. Dakan –

[371] A. That's what I'm trying to say. They never did say – nobody ever said that he broke in there. See, I went to the police. They didn't say he broke in there. He told them how he got it and that's the way they let him go.

Q. Yeah, but I understand what he told them then, but we have had evidence today or this week that he broke into that store and stole those things.

A. Well, that's the first time that I knew that he did –

Q. All right.

A. – because I was under the understanding that he didn't get it out of there, that it was given to him and that's what – the way it comes down with the police.

Q. That is what he told you?

A. That's what the policy said.

Q. Okay. But Dorsie told you that, also?

A. Yeah.

Q. All right. Sort of like when you come up on his friends and he is doing something that is wrong, he hid it from you?

A. I understand that.

Q. Is that what you are saying?

A. I understand that.

Q. And that was still two years before his [372] mother died, wasn't it?

A. Uh-huh.

Q. And, in fact, that was when he went to Waco, isn't it?

A. (NO RESPONSE)

Q. He checked out of school here in high school or in junior high on December – or maybe it was the high school and went to Waco, isn't it?

A. (NO RESPONSE)

Q. Isn't that when he went to Waco?

A. Yeah, but he had already been down to Waco. He just went back. He'd come –

Q. He went to Waco when he was in the eighth grade. Right?

A. Yeah.

Q. The first time?

A. Uh-huh.

Q. Is that right?

A. Uh-huh.

Q. He had gotten in trouble then, too, hadn't he, and he went to Waco?

A. No, hu-uh.

Q. And then when he got in trouble down at Waco and then he came back to Colorado City –

[373] A. Not in the eighth grade.

Q. Went the whole year in the ninth grade here in Colorado City?

A. Uh-huh.

Q. Then the tenth grade, he was about fifteen and he was already smoking dope and drinking alcohol with his friends at age fifteen?

A. (NO RESPONSE)

Q. Right?

A. I didn't know about it.

Q. Okay. He hid that from you?

A. Yeah.

Q. But the young lady that he dated then, Paula Williams, she was in Court the other day, she said when he was fifteen he was always – he was already smoking pot, smoking dope I think is what she said, and she argued with him. She apparently did, like you did, told him not to do that.

A. Yeah. I heard her say that.

Q. Okay. And that was still two years before his mother died. Right?

A. She died in '84.

Q. In 1984?

A. Uh-hu.

[374] Q. And so when he got in trouble again in 1982, he withdrew from school December the 13th, 1982?

A. He wasn't in no trouble then.

Q. That is when Doug Smith said they burglarized the athletic store in Colorado City. On December the 13th, 1982, is when he withdrew and went to Waco again.

A. Yeah. He went, but I mean he was already going before that happened, I guess, because – well, the plans had already been made for him to go.

Q. Was he already in trouble then?

A. No, not – he wasn't in no trouble about that because he went to the police –

Q. Every time –

A. –and they said no.

Q. Every time he got in trouble, either the school talked to him or you talked to him. Right?

A. As far as I know.

Q. Told him that could not be – that was unacceptable conduct. Right?

A. Uh-huh.

Q. And just could not continue. Remember that?

A. Yeah.

Q. Do you remember when he cut Rocky Salazar? You remember when he was suspended from school then?

[375] A. Yeah.

Q. They brought him out of you, didn't they?

A. They did.

Q. And you punished him?

A. I did.

Q. How did you punish him?

A. With a belt.

Q. And they suspended him and put him on probation there in school until October 10th. Do you remember that?

A. Uh-huh.

Q. Do you remember, Mr. Johnson, what happened on October the 10th, the day he came back to school and got off probation?

A. No, I don't.

Q. Dorsie stabbed Dennis Pfeuffer. Do you remember Dennis Pfeuffer?

A. Yeah. He spent lots of nights with him at his home.

Q. Dennis – Dorsie stabbed Dennis Pfeuffer in the hand with a pencil. He made a stabbing motion at his stomach and then stabbed him in the hard. Dorsie said it was an accident. This was Dorsie's first day back at school since he was suspended October the 10th, 1980 – 1979. That didn't [376] – it didn't do any good to discipline him and tell him that it was wrong and punish him for it that time, did it, Mr. Johnson?

A. Well, I didn't even know about that.

Q. All right.

A. The school never said anything to me about it.

Q. And he told you it was just an accident?

A. I didn't even know anything about it.

Q. All right. Well, he told you it was just an accident when he cut Fred Dakan on the legs. Do you recall they suspended him again then?

A. Yeah.

Q. And again he says that is just an accident. Right?

A. That's what he said.

Q. He picked up glass and, according to the testimony we heard in the Courtroom, he cut one of the legs of Fred Dakan and Mr. Dakan bled and then he cut the other leg with a piece of glass and he says it is just an accident. That is what he told you?

A. Uh-huh.

Q. But talking to him – you punished him again, I take it?

[377] A. I did.

Q. And how did you punish him then?

A. With the same way. I talked to him and had him understand the pranks had to quit. The pranks wasn't no good. He could've hurt him. At the time I was up there and they was practicing track. I was up there to pick him up and Fred came by and he just had a little trickle of blood on one leg. And I said, "What happened to you?" And he didn't say anything. He just kept on going.

Q. Might have been afraid, you think?

A. I don't think he was afraid –

Q. That was before his – Dorsie's mother died –

MR. CONARD: Your Honor, I object to the Prosecutor interrupting Mr. Johnson's sentences and not allowing him to complete his answer.

THE COURT: All right. I will sustain the objection.

Q. (By Mr. Armstrong) That was before Mrs. Johnson died –

MR. CONARD: Well, Your Honor, he needs [378] to go ahead and finish his answer.

MR. ARMSTRONG: Judge, I am asking him –

THE COURT: Yes, but I think you asked him a question and then he didn't – before finishing his answer, you asked him another question. You asked him was that before his mother dies.

MR. ARMSTRONG: Well, his answer wasn't responsive.

THE COURT: I never did hear what the answer was.

MR. ARMSTRONG: I want to ask the question.

THE COURT: All right. Ask him again and we will see what he says.

Q. (By Mr. Armstrong) All of this was before his mother died, wasn't it?

A. Yeah.

Q. And it was right after that – you said that was in the eighth grade. It was right after that that he went to Waco again or that was the first time he went to Waco?

A. His mother came and got him.

[379] Q. Yeah. All right. He stayed there in Waco for awhile and when he came back that summer when he was fifteen, he was smoking dope and running around with a bad crowd, drinking liquor and not telling you?

A. No. The only thing that I could say was that he was home when he was supposed to be. If he was at school at some curriculum, I picked him up. I brought him home. He did not run around at that time.

Q. All right. Then when he got in trouble again in 1982 when he went to Waco, he went to Waco again in December, 1982 –

A. Well, he had already been –

Q. Well –

A. Well, he had already been and came back for Christmas, came back for – let's see. He started school here. Then he went down for Thanksgiving. Then when he came back, he decided he wasn't going to go back down there. That's when we made the preparation for him to go back down there.

Q. All right, sir. But he withdrew from school on December 13th?

A. Uh-huh, at my permission.

Q. Yes, sir. That was when – whether it was a coincidence or otherwise, that was exactly when he and Doug Smith broke into the athletic store?

[380] A. That wasn't the reason he went back to Waco.

Q. Okay. But he did go to Waco then?

A. Yeah.

Q. He didn't always tell you what he was doing and what his reasons were?

A. He was supposed to be going back down there for Christmas.

Q. And he stayed there for awhile?

A. He stayed there for the rest of that year.

Q. All right.

A. The rest of the school season.

Q. Until he got in trouble again and then he came back to Colorado City?

A. No, he came back here and then went back down there again before he got in that trouble.

Q. He went back down there again in September of 1984. He burglarized a business there in Waco with Ronald Taplin, didn't he?

A. Uh-huh.

THE COURT: I didn't hear your answer.

THE WITNESS: Yes, sir. I guess I didn't know when it was.

[381] Q. (By Mr. Armstrong) Well, according to the testimony, I believe it was yesterday or it may have been the day before yesterday, Mr. Bahlmann introduced the judgment where he was convicted for committing –

A. He did. Yeah, he did, but, like I say, I didn't know when it was.

Q. Okay. According to that evidence, it was September the 24th, 1984. He and Ronald Taplin burglarized that business there in Waco. Do you know which business it was?

A. No.

Q. All right. And it was right after that that Ronald Taplin murdered Dorsie's sister and brother-in-law?

A. That was in '85.

Q. Yeah. It was just a couple of months. Right?

A. (NO RESPONSE)

Q. Just a few –

A. You said '84 when he burglarized that place?

Q. September of 1984, just a –

A. This was October in '85.

Q. All right, sir. Okay. But they burglarized that store there in Waco before Mrs. Johnson died? Before his mother died, they burglarized that store?

[382] A. I'm not sure. Seems like I thought she died on September the 7th. It might've been October the 7th. I thought she died on September the 7th.

Q. All right. Either way, two weeks after his mother died or two weeks before she died, he is out with Ronald Taplin?

A. It must've been after because he was there.

Q. Of course, he had already been there.

A. He was there when she died.

Q. Yeah. So he must have burglarized it before. Right?

A. No, because he came here.

Q. He came here what?

A. After he burglarized that place.

Q. Yes, sir.

A. He came here.

Q. That is right.

A. Like I say, he was there when she died so –

Q. Yes. sir. He would still have been there. He didn't come here until April or May of 1985. He was on probation there in Waco. Right?

A. Well, wasn't it '85 when he done that?

Q. No, sir. He was placed on probation in January of 1985.

[383] A. Well, that's what I'm talking about. She died in '84.

Q. But he was – he did the crime in September. You don't go to trial the next day, usually. And he was on

probation. They told him on probation that that is wrong to do that, to break into somebody else's store and there are certain rules you have to live by on probation. And the probation officer said he wouldn't live by those rules, even though the probation officer sat down and talked with him. He wouldn't live by those rules. I guess he didn't tell you that, either, did he, Mr. Johnson?

A. No.

Q. No, he didn't.

MR. ARMSTRONG: I pass the witness.

[384] REDIRECT EXAMINATION

Questions by Mr. Conard:

Q. Mr. Johnson, did Dennis Pfeuffer visit back and forth with Dorsie?

A. Yeah. He spent a lot of nights over at his house. Stayed all night with him.

Q. You weren't there when this pencil incident happened at school, were you?

A. No, I wasn't here.

Q. You didn't know whether they were playing –

A. No.

Q. – or what happened?

A. No, I don't.

Q. You started to tell the Jury about Fred Dakan's leg, what you saw on his leg. Would you finish telling

them what you saw on Fred Dakan's legs – on his – I believe it was the right leg.

A. I was – just looked like it had been scratched and the blood didn't run. It just made a spot on there. That's the way the leg looked because I saw him trottin in and I didn't even see no scratch on that other leg.

Q. Okay.

A. They were supposed to have been running cross [385] country. Of course, he was doing that when they came in. They were running, too. I believe it was him and Rocky.

Q. Is there anything else I haven't asked you that you need to tell the Jury or that you think you need to tell the Jury, Mr. Johnson?

A. Mr. Conard, all I can say is I still think that a kid eighteen or nineteen years old has an undeveloped mind, undeveloped sense of assembling not – I don't say what is right or wrong, but the evaluation of it, how much, you know, that might be – well, he just don't – he just don't evaluate what is worth – what's worth and what's isn't like he should like a thirty or thirty-five year old man would. He would take under consideration a lot of things that a younger person that age wouldn't. An act of impulse and if you've got something to push it, a breakdown in your resistance, then you'll act before you have time to evaluate what's going on. In my experience, like I said, that young age, I took a drink or two and if I got in my car – most of the time if I was going to drive anywhere, I didn't bother with drinking. But if I did get in there and had a drink, I had a tendency to drive faster

than I normally would drive because my sense of evaluations wasn't all right. But when I didn't have nothing to boost me, I'd say, "No, that's too fast." I controlled myself. And from what I read on drugs, it's [386] worse. You lose value, the value of things. That's the reason I said if he was locked away from it where next time around he would evaluate, he'd have a different value of what his life is, especially towards other people. He'd have a different value.

MR. CONARD: Thank you, Mr. Johnson.

A. It would be mature.

MR. CONARD: Thank you, Mr. Johnson. Pass the witness.

MR. ARMSTRONG: No further questions, Your Honor.

THE COURT: You may step down, Mr. Johnson.

You may call your next witness, Mr. Conard.

MR. CONARD: May I have a moment, Your Honor?

THE COURT: Yes.

[REPORTER'S NOTE: Discussion off the record between Mr. Conard and the Defendant.]

[387] MR. CONARD: Your Honor, the Defendant rests.

DEFENDANT RESTS

THE COURT: Do you have any rebuttal testimony, Mr. Armstrong?

MR. ARMSTRONG: Yes, Your Honor, I do.

THE COURT: All right.

MR. ARMSTRONG: Call Mike Bailey.

THE COURT: Better swear you in again, Mike.

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[414] Argument on behalf of Texas

MR. ARMSTRONG: Your Honor, if it please the Court, Mr. Conard.

MR. CONARD: Mr. Armstrong.

MR. ARMSTRONG: Ladies and gentlemen of the Jury, I come before you again in the last part of this criminal trial. The last part of any criminal trial being the Jury summation at the conclusion of the punishment evidence. The trial has gone quicker than we anticipated. As I indicated Wednesday, it has gone quicker than I had anticipated. Again, it does not lessen the fact that you have served through a long and trying week and I appreciate it. I thank you for your service.

The Judge has read to you the Charge. Again, as before, you will get the Charge with you when you go into the Juryroom. Again, read it, study it, deliberate on the issues, consider the evidence and return a verdict, a verdict that I believe that you know that this evidence has shown beyond a reasonable doubt, beyond any doubt as the only just and proper verdict that can be entered in this case based on the evidence; that is, a verdict of yes to

special issue number one and an answer of [415] yes to special issue number two.

Let's talk just about those special issues. Special issue number one, "Was the conduct of the Defendant, Dorsie Lee Johnson, Jr., that caused the death of the deceased committed deliberately and with reasonable expectation that the death of the deceased or another would result?" Of course, there is no another in this case. We are going to talk about that a little bit, but I also – I want to talk – before we do that, I want to talk about that special issue.

If you will recall at voir dire, we talked about the word deliberately probably being the key word in that question. I submit to you, ladies and gentlemen, that the evidence shows overwhelmingly, again, beyond any doubt that not only was Jack Huddleston killed intentionally, but he was killed deliberately with whatever definition, whatever meaning you ascribe to the word deliberately.

Dorsie Lee Johnson, Jr., the Defendant in this trial, in this case took the deceased and laid him on a floor. If you will recall the evidence, laid him on his stomach, if you will recall the evidence, nose down to the floor and shot him [416] in the back of the head. It was no accident. It was more than just intentional conduct. It was the will of Dorsie Lee Johnson, Jr., to do that.

How do we know that? Because he planned it. You will also recall, perhaps, that premeditation is not required to be proven, but we proved premeditation. Dorsie Lee Johnson, Jr., went to Allsup's Convenience Store for no reason but to rob that store and leave no witnesses and he stayed there from at least 3:00 o'clock in

the morning to about 4:20 planning and discussing with his cohort, Amanda Lynn Miles, how they could not leave any witnesses.

"We then drove around a little more and talked about how we would rob Allsup's. We both agreed that there couldn't be any witnesses." Premeditated. Premeditation is not required. The State proved premeditation. They deliberated, if you will, in the horriblest sense of the word.

We use that word to say that a jury weighs and considers all of the facts and the evidence and determines what the proper course of conduct is. They deliberate. They act deliberately. And Dorsie Lee Johnson, Jr., did the same thing in [417] the most perverse way that that word can be used. He sat around and planned how "we'll get the clerk into the cooler and kill him."

You will recall there is other evidence. His brother-in-law – "Dead men can't talk," he told his brother-in-law with a laugh. He was still bragging about it a month later, a month and a half later, whenever it was, whenever he shared the same cell with Ed Ramshur. "Why? Why did you kill the man? You already had the money, you had him helpless, why did you kill him?" Paraphrasing, "Because I deliberated on it and thought about it and realized we couldn't have any witnesses and so I took away any chance that he would have to have a continuing life with his parents, with his wife, with his children, with his grandchildren and I deliberately shot him in the back of the head."

There can be but one answer: "We, the Jury, find and determine beyond a reasonable doubt that the answer to special issue one is yes."

I want to call your attention, though, to one other part of that special issue. I could not help but be hit in the face when I heard the Judge read the special issue, and I have dealt with this [418] special issue for six months. But it really hit me again when I heard him read it out to you just a moment ago. "Was the conduct of the Defendant, Dorsie Lee Johnson, Jr.," says so in the Charge, says the name, "that caused the death of the deceased," and there is not another comma. It doesn't say Jack Huddleston. Just goes on and asks the rest of the question. "Was it with the reasonable expectation of the death of the deceased, and it just goes on and asks the rest of the question.

Have we forgotten Jack Huddleston? Pencil it in your mind. Caused the death of the deceased, Jack Huddleston. Deliberately, premeditated, cold-blooded. The answer is yes.

Special issue number two. "Is there a probability that the Defendant, Dorsie Lee Johnson, Jr., would commit criminal acts of violence that would constitute a continuing threat to society?" A key word, probability. Is it more than a possibility? Is it more likely than not? In street parlance, is it a good chance that he is going to do criminal acts of violence and will – or are they the kind as directed at himself or at others? Bad deeds, [419] criminal acts of violence. We are talking about more than writing hot checks. We are talking about the type of things where

you hit somebody in the nose. We are talking about the kind of thing where you throw a brick at them. I am –

MR. CONARD: Your Honor, I object to that as a misstatement and misapplication of the law as it invites the Jury to apply relatively minor infractions of the law to that special issue.

THE COURT: Well, it is argument. He is drawing, I think, a reasonable inference. So I will overrule the objection.

MR. ARMSTRONG: Thank you, Your Honor.

MR. CONARD: We would ask – well –

MR. ARMSTRONG: Thank you, Your Honor.

Again, ladies and gentlemen, the State has the burden of proof. The Charge tells you that. We have to prove what the proper answer is to each question beyond a reasonable doubt, to prove that there is a probability, a more – it is more likely there is a good chance it will happen.

The State doesn't have the burden of proving beyond any doubt, a hundred percent sure, that it absolutely will happen. Think over that word [420] absolutely and compare it to probability when you consider that special issue because I submit to you, ladies and gentlemen, that the State has proven beyond any doubt, even though we don't have to, that there is a probability, that there is a very good chance that it is highly likely, that this Defendant will continue to be a threat to society.

What kind of person is Dorsie Lee Johnson, Jr.? Before this trial you didn't know. You – I believe most of

you had never heard of him, except the fact that he had perhaps been charged, the same thing that every Juror was told. But you now know that he is a cold-blooded, heartless, premeditated murderer. You now know that he has been without remorse, without sorrow for criminal acts of violence since the time he was twelve years old, starting in the seventh grade.

You now know that he committed aggravated assault on Rocky Salazar. You now know that he cut Fred Dakan on the legs. And don't give me this accident bit. You don't pick up a broken piece of glass and accidentally cut into another human being on the legs. But if you want to give him the benefit of the last possible vestige of doubt on [421] that case, that crime, you can.

You now know that he went ahead and cut the other leg. That is what Fred Dakan said. You now know and it is in evidence and you can examine it and look at it that even after having been placed on probation, he came back from probation, school probation, and stabbed another friend with a pencil. Didn't poke him. Stabbed him.

You now know that he went on from there and if Mr. Conard wants to argue that, surely you are not going to answer those questions yes and give somebody the death sentence because of a just minor cutting up some people when he was twelve or stabbing somebody.

You now know that he didn't stop there. When he was fifteen, he was dating other young people and smoking dope and drinking liquor. You now know when he was fifteen he burglarized a store, a business, broke into it, stole their property. That is a threat to society, ladies and gentlemen.

They took him down to the police and immediately sent him to Waco. You now know that when he got to Waco, Texas, he committed another burglary, a felony crime, another felony crime. You [422] now know that he was violating the law and possessing and carrying a gun when he was fifteen or sixteen or seventeen. Think of that. Fifteen, sixteen, seventeen years old and he is fighting with Tommy Jackson for a gun or he takes a gun to a fight and they take it away from him.

You now know what kind of person he is. He is the type of person who just earlier this year, even though he is on felony probation for which he can go to the penitentiary, takes an axe to his former girlfriend, threatens to whip her ass – pardon my languague [sic].

You now know he is on felony probation and he is instructed that you cannot violate the laws of this State or any other States or the United States, he is smoking dope and goes in and tells his probation officer, "You can't do anything to me." Not exactly his words, but I am paraphrasing. "You can't do anything to me. I smoked dope last night. No sense giving me the urine test." Not once, but two times. And when they get ready to come down on him, he runs back to Colorado City.

You now know that he is the type of person who takes a gun and points it at a young lady who [423] says, "He has been like my brother." And that is against the law to carry a weapon. And he takes that gun and the kids say, "Mama, Dorsie's going to shoot you." What chance, what chance do the kids have if Dorsie Lee Johnson, Jr., is around? They have the chance to learn from Dorsie Lee Johnson Jr., to carry that gun.

But that wasn't it. You now know that he is still carrying that gun again the next week when she comes over to visit his sister and he invites her in. She opens the door and he is sitting there pointing the gun at her. He invited her in, pointing that gun at her. That same day, that same day, three hours later, approximately, she said it was about 11:00 o'clock, he goes into another store and tells you, "We went and told him hold up. I shot him once." The doctor told you where he shot him. Right in the face, right below the eye.

He wasn't through when he shot him in the face, in the eye. Look at State's Exhibit 64 and read his statement. "I shot him once. Then hit him over the head with a wooden handle weeding tool." Broke it over his head and dropped it in that huge pool of Don Burrus' blood. That is what [424] kind of person Dorsie Lee Johnson, Jr., is.

You would think that he satisfied his appetite for blood and death when he laid Jack Huddleston on the floor and put this bullet in his brain, but the very next week – recall, that is March 23rd, 1986 – the very next week what is he doing? He is in Shakey's Pizza Parlor with his gun, a private club. That is a felony. He is in the private club and he chases somebody out of that private club. And it is bad enough that he shoots at the man, but to come back in and laugh and joke. "Ha, you should have seen that man I was shooting at. He had to drive away with his head down." That is what kind of person Dorsie Lee Johnson, Jr., is.

You now know what he is. You now know what is the only just and proper verdict in this case and the only just and proper verdict that can be rendered in this case.

Wednesday in the summation stage of that part of the trial Mr. Conard suggested to you that you not be overcome with emotion, that you decide that case and this case based upon the facts presented before you, based upon the facts presented before [425] you. You now know that he deliberately caused the death of Jack Huddleston and you now know that he going to be and is and remains a threat to society.

Under the evidence the only verdict, the only answers to those special issues is yes.

Thank you.

Argument on behalf of Defendant

THE COURT: Thank you, Mr. Armstrong.

Mr. Conard.

MR. CONARD: May it please the Court, Mr. Armstrong.

Ladies and gentlemen of the Jury, I have to tell you that, first, I feel somewhat anxious or concerned as I stand here before you. This is not something that I have ever done. I don't think any of us have and I don't think any of you have ever been in this particular situation.

I have to – I don't know whether I have put on the right evidence that I should have put on. I don't know that I have asked the right questions, the questions that you may have wanted answered. That is why I am anxious.

It occurs to me that each of you must also be anxious or concerned yourselves because of the [426] extremely

awesome burden and the decision that you are going to have to make in a short while.

Now, I would like to talk to you, first, briefly about the reasons that we have the punishments that we have.

You understand, of course, that Dorsie Johnson is either going to be sentenced to life in prison or he is going to be sentenced to death. One of those two things.

Punishment? The death penalty, the life sentence, both of them are punishment. I recall that I think every one of you, at least most of you, agreed with me in voir dire that a life sentence is a harsh punishment. One reason we punish people with either sentence is for vengence, retribution, to punish for punishment's sake. That may be an appropriate reason.

There is a need for punishment. Very often punishment is concerned with restitution, to make restitution to the victim or the family or whatever. I think each of you sees that nothing either sentence will do will bring back Jack Huddleston. A death sentence is not going to bring back Jack Huddleston. A sentence of life is not [427] going to bring him back. So restitution cannot enter into it.

There is not anything that any of us can do or say that will lighten the burden on Jack Huddleston's family. So, now, you must be concerned with what the evidence shows as the appropriate punishment for Dorsie Johnson for taking Jack Huddleston away from his family.

Rehabilitation is another reason we punish in our Country, in most countries. In other words, we try to apply an appropriate punishment by removing people

from society and putting them in a place where they can correct their actions and beliefs and become useful members of society again. That may or may not happen in this case.

Again, if you sentence Dorsie Johnson to a life sentence, you are instructed not to consider parole. There is never any guarantees of what the future may hold, but, nonetheless, the life sentence is what you must consider under the Court's instructions and under the law.

Now, obviously, a death sentence will not be rehabilitation. So that is not a thing to consider for punishment. You don't rehabilitate some [428] one by killing them.

Another thing I think we talked about in voir dire is deterrence. Many of you thought that a death sentence was a deterrence to crime, that it might stop other people from committing crimes. I think, also, you would agree or most of you do that there are opposing viewpoints to that.

I have read that in England – England used to have something like 172 different crimes that were punishable by the death sentence. One of the crimes was, in fact, pick-pocketing. They hung pick-pockets in England at one time. And, in fact, there were public executions. Everybody could come and gather around in the crowd. Do you know what they discovered when they were hanging a pick-pocket, executing him? They discovered that there were more pick-pockets out in the crowd because that was a convenient place. It did not deter the pick-pockets. They were out performing their trade. So I don't know whether it is a deterrence to other people.

Maybe the problem I have with the idea of deterrence is that it says, let's don't punish him for this crime. Let's punish all the other people [429] out there that might do a crime. I know each of you have agreed with me in voir dire that under our system a person is entitled to be punished only for the crime that he is convicted of, you see?

We are at a particular place in our history, the history of this Country, a Country two hundred years old. I think it is common knowledge that every country and every person looks back to other countries sometimes with criticism and sometimes with praise. For instance, our Country looks back in history at certain – at certain regimes and certain countries with definite criticisms. We look back at Hitler Germany with criticism. His ideas – we do not have to be civilized even – but, yet, at that time that country and that government thought that they were appropriate.

The Romans made great sport of putting the Christians in the coliseum and letting the lions in. They thought that was appropriate and nothing was wrong with it. But, yet, we look back through history at that with revulsion.

It occurs to me that – I wonder what a hundred years or two hundred years from now we will [430] look back on this Country as to sentencing people to death for crimes as to what will people think of it then.

England, the Country that had so many death sentences, finally did away with the death sentence altogether after they hanged a man who was wrongfully accused and after he had been executed, they found out

later it was a mistake. Of course, that is the kind of mistake that cannot be changed.

I am not suggesting that you have made a mistake in convicting Dorsie Johnson. I know that each of you deliberated very seriously on the evidence you heard and it was strong evidence. How can you ignore a confession where the persons says, "I did it. Here is everything spelled out for everything we did. I did it and signed it." How can you ignore that? I understand that.

But, nonetheless, what if he put all of that on paper and it wasn't true? I think each of you can see that the other evidence may not have been as strong as that. What if the things he said to people weren't true? That is just a possibility. I don't know that that would happen, but, anyway, a death sentence cannot be changed; errors cannot [431] be corrected.

You should each realize, and I hope that you do, that this is not a plea for leniency. We are not asking you to let him off. We are not asking you to turn Dorsie loose. None of those things. He is going to be punished, punished. Each of you know that he is going to be punished harshly no matter what.

If he receives a death sentence, there are those that would say his punishment only lasted until he is executed. Then he is freed from the burdens of the world and the punishment. If he receives a life sentence, his punishment will last for a long, long, long time.

You have already heard from the officers from Colorado City that he is charged – I think you can assume that he will be tried for – I think they said he is charged with

attempted capital murder in Colorado City. Of course, he can be punished for that on top of this, you see. So his punishment has begun and will continue from here on. So we are not asking for leniency, if you will, but are asking for the appropriate punishment under the evidence.

[432] Now, as you will all recall, throughout the voir dire, as we talked to each one of you back there several weeks ago, one of the main things we always talked about was the special issues that you would see that basically decide how we set the punishment in a capital case. We talked about those questions that will be asked. You have heard the Judge read them to you. The District Attorney read them to you a moment ago. So I would like to talk to you a little bit about those questions.

As we said in voir dire, deliberate seems to be the key word in that first question. It is the word that, as I recall, most of you had somewhat of a bit of difficulty trying to differentiate between the word intentionally and the word deliberately. And, as we said, if you are trying to decide what deliberately means, that means you have already found him guilty of intentionally committing the murder. So now you have got to decide if his conduct was deliberate. And in deciding that, you should look to the evidence and, again, not – you don't have to believe my argument. You don't have to follow mine because it is not binding upon [433] you. The evidence is all that is binding. The same way with the District Attorney's arguments. You should consider them and, I suggest, both sides. But the evidence is what you must interpret and you must decide from.

You noticed, perhaps, as the Judge read the Charge that there was not a definition for deliberately. And Mr. Armstrong has given you an interpretation of what he believes to be an appropriate definition. I would also like to suggest a definition for you for the way deliberately is applied. Deliberate means thoughtfulness and care in deciding or acting. Thoughtfulness or care. Deliberate is applied to what is done not hastily, but with full realization of what one is doing.

So Mr. Armstrong has already said they drove around and talked about it for a little bit and then went in and did it. That is deliberation, but, under that definition, with full realization of what one is doing.

Now, you notice the Charge – you may not have noticed, but if you will read it again, it tells you that you should consider all of the circumstances, either aggravating or mitigating. [434] Mitigating circumstances are those that indicate that you should be less harsh with your punishment, if you will. That is one way to look at it. They mitigate, lessen the harshness of it.

So as to deliberate, did he have full realization of what he was doing and what the effect would be of what he was doing? You found that he intentionally shot him. That is true. So, now, was it deliberate? Did he have full realization as to what he was doing? So the mitigating circumstances to that might be his age. I don't know that that is all of the mitigation in the case if he should have at the age of nineteen full realization. But the other one you heard – do you remember – first off, you have heard much testimony from several people that he had gotten involved in drugs, the use of marijuana and the use of

cocaine. I would suggest that when people get so involved with the drugs that they cannot contemplate what their actions and what the consequences of their actions is going to be, that they cannot formulate decisions and deliberate with full realization of what they are doing.

You remember Edward Ramshur? His testimony [435] said when Dorsie was telling him all this stuff in jail was that – he said that they had been driving around, smoking marijuana laced with something. So if his mental functions were so impaired because of that that they couldn't really deliberate and realize the wrongness of this conduct, that is something that you should consider in deciding whether or not his actions were deliberate, you see?

Now again, you understand that we are not asking you to turn him loose because he is going to be sentenced to a life term in the penitentiary at the very least.

The statement Dorsie gave also indicates that Amanda is the one that brought the idea of shooting Mr. Huddleston us [sic]. And, in the first place, put the idea in his brain. She is the one that had the gun along. You can consider that, too.

You can consider that, well, maybe he wouldn't have done it had he thought about it or had she not been there. Had he thought about it more, had she not brought it up, that never would have happened. We, of course, we can't go back and change what happened, sad as that may be.

[436] If you find then that because of his mental state or because of the reduction in his mental capacity that he

could not deliberately act with full realization of what his conduct was, then you would answer that special issue no.

Of course, special issue number two is basically the other one that we spent some time on, that being, is there a probability that the Defendant, Dorsie Lee Johnson, Jr., would commit criminal acts of violence that would constitute a continuing threat to society. Again, there are several sections or words in there that are very important in that sentence. You shouldn't read it lightly. You have to break it down. Of course, the first one being probability.

You noticed or you may have noticed as the Judge read the Charge that he didn't define probability for you. Again, that is the word that each of you may have an idea in your own mind what it means and how it would apply in this case. And when we get down to it, that is what is important because, again, you, as the Jury, and each of you individually has to make that decision and apply the evidence to this case, again, weighing the [437] credibility of the evidence as you did on the guilt or innocence phase.

I would suggest that probability, probable means that it is likely to occur or prove true, in all likelihood or very likely, but those terms define probability. You should not, of course, confuse probability with possibility because it doesn't say possibility. It says probability.

Now, as we talked about that question in my interpretation, that means to predict the future, what is going to happen in the future twenty or thirty or forty years down the road. I can't argue – anyone could say what possibly may happen in the future on anything. I can't

tell you that that, as far as possibility goes, that any – you know, anything is possible. You have heard that. But probability, probable is another word entirely. So you have to consider what probability is. That is what you must determine. In other words, is it very likely to occur in the future. And, again, in deciding that, probability, you look to the evidence. You look to the people that testified and what they say.

One thing you can look to is who called them [438] to say what they said.

Now, you will remember that the first few witnesses of Mr. Armstrong for the State on punishment, Rocky Salazar, for instance, even though he had the incident with the broken bottle with Dorsie, when Mr. Armstrong asked him, well, what his reputation was for being a law-abiding citizen in the community in which he lives, he testified it was good. He said, "Even though he cut you with a bottle?" "Yeah, other than that, it was good – he had a good reputation." I didn't hear that question asked again of any more witnesses.

You will also recall that Mr. Johnson said after that and Rocky Salazar said after that that they were still friends. They still ran around together. They went to each other's houses. So whatever happened, it wasn't bad enough in Rock Salazar's mind to end or destroy the relationship that he had with Dorsie Johnson. That is a mitigating factor. That is something to consider. The good reputation is something to consider in looking to what the future may hold.

Fred Dakan testified – when he testified, I thought they were – the injuries were horrible [439] gashes on his

legs. If you look in the school records that were admitted, brought forward by Mr. Uselton, you will see that they characterize them as one – one of them was a scratch and one of them was a cut. That is what the school records and people that saw him at the school characterized them.

Remember Mr. Johnson saw him and talked to him, tried to talk to him and saw that it was a small cut with a small trickle of blood. I am not saying it is right or wrong. I wasn't there. You heard the testimony and, again, it is up to you to weigh the credibility and to decide how it applies in this case and whether or not it really counts towards what he would do in the future now that he has been caught and is going to be punished.

As far as good and bad reputations, you will recall that the only person that testified that Dorsie Johnson had a bad reputation was Fred Dakan's mother. I can understand that she would testify to that since her son had a problem with him.

Look in those school records. He wasn't the greatest student in the world. You heard the testimony about that he was basically regular in [440] attendance. He was there almost all the time when he was supposed to be, except for the time he went to his mother's.

One of the teachers saw and reported directly to Mr. Uselton that they saw improvement in Dorsie and, basically, said that he can do better. He is doing better. Look in the records. They are there. That note is there. One teacher saw hope in Dorsie. We don't know what the others saw because they didn't report it, but that one

thought enough to write a note to the superintendent telling him of improvement.

You will remember Mr. Lowrance, the school principal, that had known Dorsie for some time. He had taught kids for twenty-six years and been in the school system and was well aware that, as I think would be common knowledge, that some kinds give trouble in school, but after they get older, they have straightened up and gone straight and gone right. Others don't get into any trouble and turn out bad later or vice versa.

But despite Mr. Armstrong's attempt to get him to predict how each kid would do, he said, "Well, you can't really tell. You just never know [441] who is going to change for the better or who is going to change for the worse." You never know.

But, you see, that is what you have got to decide in answering special issue number two: Is there a probability that Dorsie will change and did the State prove beyond a reasonable doubt that probability? Because, remember, the burden is still on the State and that burden is still beyond a reasonable doubt. That never lets up. It never lessens, never shifts and it says so in the instructions.

The probation officer from Waco testified that drugs can affect the actions of young people or older people, too. Anybody that gets tangled up with them is going to – it is going to affect their actions and their thought processes and how they do. It is unfortunate and it is a bad thing for our society, but it is there. He testified to that. That is something you can and should consider.

He also agreed that age is something. You will remember he said most of the people he handled were young people and that very often later on as people mature and grew out of their, perhaps, [442] rebelliousness or whatever, immaturity or whatever, that they changed. They were different. They changed.

You will recall the friends of Dorsie, the people that had known him for years, all of his life. Paula Williams, I think she had known him some eight or nine years and had dated him. She didn't like his usage of marijuana and she fussed with him about that and argued with him about that. She recognized that it could do to him and what it would, I suggest, eventually do to him: lead him down the wrong path, brought him nearer to where he is today. It brought misfortune to a lot of people.

But, yet, despite all that, you will remember that Paula Williams told you on the stand that in her opinion, and this is from somebody that had known him and not somebody that had just been around him as a peace officer or for a little while, but somebody that knew him and had been around him a lot and at home and going to parties and whatever, she told you that in her opinion he would not – if he got out of this, this trap of drugs and control from drugs that he was in and [443] was able to spend time in prison that in her opinion he would not commit violent acts in the future.

You see, that is evidence. That is evidence that he would not do it, mitigating evidence, again.

I don't recall hearing anyone testify that in their opinion he would commit violent acts in the future. In fact, you remember Beverly Johnson, the girl that had

known Dorsie all his life, ever since he was a baby? She is just like a sister to him, brothers and sisters. She likewise, even though there had been spats and whatever, she still stayed right with him and she was around him all the time. She is upset about all of this. Naturally, who wouldn't be? But, yet, she still testified, also, that in her opinion from having known Dorsie and having known him all of his life that, first off, if he did it, is what she said, that it would be on account of the drugs, was what she thought, which, again, lessens his mental resistance, if you will. And then she testified in her opinion she knew he would not commit violent acts in the future once he is removed from those drugs, and that he would change his ways if he went to the pen.

[444] That is, again, evidence that is for you to consider, sworn evidence from the stand from somebody that has known him.

She also said that he – in her opinion he was not a bad person.

Now, he is – you look at him. He is a person. He is a human being. That is something you should remember. He is not just a Defendant. He is a human being.

She said he wasn't a bad person, but he has done bad things, but that doesn't mean that he is not a human being and a person.

So he is to be punished for the bad things he has done and not because he is not a person.

Those were really the only people that knew him. The other folks were too little guys from – I guess they

were both down from Houston or Dallas or somewhere. They were at the Pizza Inn.

Then, of course, the police officers that testified to the other – the incident in Colorado City.

So, you see, that is – those are some of the things that you have to consider in deciding probability to commit criminal acts of violence in [445] the future and what you have to consider is the evidence.

Now, you see what the state wants you to consider is basically everything that has gone on before. That is appropriate. You should consider it. But everything that has gone on before is basically – or basically the acts of course of conduct that has already occurred and prior to the time that he is going to receive the punishment that he is going to receive here, you see? So that has happened.

Now, if he is punished, what does the future hold? That is what you have to decide is what does the probability hold? If you are wondering how does he feel about it? Does he feel remorse? Do you remember his daddy testified to that, that he was sorry, that he was remorseful. I suggest that all of these statements show remorse.

He never batted an eye. He started making statements left and right. A person doesn't put out that kind of statement and spill their heart to incriminate themselves that way unless they are remorseful and have a guilty conscience. He laid it out for them and they – you know, they [446] had all they need to put him away right there, and he laid it out for them. I suggest the fact that he did that without saying, "No, I want a lawyer. I'm a

hardened criminal. I want to fight this. I want a lawyer. I am not going to say a word to you." Instead he told them all about it. That shows remorse. That shows that he had a guilty conscience, that he had to get it off his chest, knowing that he was going to be punished, you see?

Now, the other thing in that issue that is important, of course, is one other thing: criminal acts of violence. That phrase, criminal acts of violence, I find it absurd to think that the Legislature when they wrote that law and that statute meant that if you think he is going to go out here and hit somebody in the nose in a fight that you should give him the death sentence instead of a sentence of life. I think that that means that basically that you have to believe that he would probability[sic] commit acts of deadly violence, you see? Again, that is up to you, the Jury to decide. You have to interpret that yourself and how it applies in this case from the evidence.

[447] The other thing in that question – in that question I think several of us talked about it in voir dire, again, is the word society. I remember Mr. Armstrong asked several of you in voir dire if you thought that, well, if he committed and[sic] act in prison, that is society. That is a part of society, isn't it?

I suggest to you that I did at that time – the ones we have talked about that prison is where they remove people from society so they are not any longer a part of society. And I think that word perhaps should have been defined for you as well. But the law doesn't provide that it will be defined for you. It is, again, up to you to decide what society is and how it is used in that sentnece[sic] and as it applies in this case.

Again, I would suggest that definition is a highly structured system of human organization for large-scale community living that normally furnishes protection, continuity, security and a national identity.

Part of society is the furnishing of protection and that is what they are going to do. They are going to protect society from Dorsie Johnson [448] by removing him from society and putting him in the penitentiary. I suggest that that does not ask you to contemplate what he might do or might now do while he is in prison. That is not what that means. Again, it is up to you to decide what that means.

So, basically, you will remember your oath that you are still under that you will a true verdict render in accordance with the law and the evidence. The law, as we have talked about several times, is the Court's Charge that the Court read to you that you will get a copy of, again, to read for yourselves and study again in the Juryroom as you deliberate.

Evidence you have heard, you get to consider the evidence you have heard from the first stage from day one, basically, all the evidence that you have heard.

The punishment phase evidence is, of course, very important because that is the evidence that tells you what your answers should be to question number two, special issue number two. Is that a probability of committing future violence in the – or future – I have misstated it, but you know [449] what I mean: future violence.

You have heard the testimony of people that knew him. That is important. Remember the testimony of his

father, or his daddy. These are things, also, that you can consider. This was evidence from the stand.

You now know instead of just the bad things that he has done – and I dare say that anyone has things in their lives that they have done that they know now were wrong and wish they hadn't done them and all that. I would dare say that very few people would like to have those things dredged up back to the seventh grade. But you heard those things. But you also heard from his daddy and how he was raised, what his family life was like and what his environment was and the problems they had in their family.

You know that he has a background in church, bil li-cal background. His dad is a very wise man, it appears to me. Seems to have had a strong run of catastrophes in his life here in the last few years. But you know that Dorsie Johnson has the background, the religious training that, perhaps, if he is removed from the drugs that he will be [450] able to apply that again in his lifetime in the prison and may be able to put it to good use in prison. I don't know that that many people would have that strong of a Bible background that go to prison. So that is something you should consider in deciding again question number two, the probability of future violence.

If he is able to straighten himself out with that background as his daddy did at age nineteen – of course, he didn't get as far away from the religious path as Dorsie did, but his dad realized finally that that was wrong and straightened himself out. Dorsie has the background to do that, too, if he is in prison.

You will remember that it was after his mother died, after his sister and brother-in-law were horribly murdered by his cousin that he really, I guess you could say, flipped out and started doing these horrible things that you have heard, really bad things. Now, he had done bad things before, I agree, but they were not the kind of things that really hurt people bad. They weren't the kind of things that were criminal acts of violence. And, again, it is not in the past so much, but what he [451] would do in the future. Probability in the future.

So those are things you must consider, what his daddy said and what his life was like and how he did live. Those are things that you are entitled to consider and should consider as mitigating circumstances.

The Charge of the Court points out to you that in answering the special issues – well, I would like to just briefly talk to you about it again. You understand and we have talked about it from day one the punishment, life or death. The Judge tells you that in paragraph two, he basically tells you how to answer the special issues, physically, the procedure of doing it. If all twelve of you unanimously decide that a particular issue, either one or number two, should be answered yes, it takes all twelve of you to decide after having decided that the State proved it beyond a reasonable doubt and considering all of the evidence and, including the mitigating evidence.

Then if all twelve of you agree, then you should answer yes. That is what the instructions tells [sic] you.

Then it tells you if ten or more decide that [452] the State has not proven beyond a reasonable doubt that the answer is yes, then you should vote no to that particular

issue. From that, it is apparent that there is another thing you can tell the Judge. You can tell the Judge if you can't – if ten of you can't vote no or twelve can't vote yes, you can tell the Judge we cannot answer this special issue because ten of us doesn't vote no, but twelve of us don't vote yes. You can tell –

MR. ARMSTRONG: That is a violation of the law and I object.

MR. CONARD: I did not inform them –

MR. ARMSTRONG: I object to him going into that. That is a violation of the law.

THE COURT: Just a minute, gentlemen. Would you approach the bench.

[REPORTER'S NOTE: The following whispered discussion occurred at the bench.]

MR. CONARD: I did not –

THE COURT: In there if they don't answer no, if there is –

[453] MR. CONARD: I just can't tell them the next step. I can't tell them. I am not going to tell them the next step.

MR. ARMSTRONG: I am saying that that is not in the Charge. What he just told them is not –

THE COURT: That is not in the Charge.

MR. ARMSTRONG: He cannot tell them that. The statute doesn't allow it.

MR. CONARD: That is not what it says, Judge. The statute – shall we go –

THE COURT: Let's go in chambers.

[REPORTER'S NOTE: The following discussions occurred in Chambers out of the presence and hearing of the Jury.]

MR. CONARD: The statute says that I cannot tell them the consequences of the failure to agree on the issue. I did not tell them. I did not inform them the effect of the failure of the Jury to answer. That is what it says. I told them that they could answer that they couldn't [454] answer.

THE COURT: "If the Jury returns a negative finding or is unable to answer any special issue, the Court will then sentence the Defendant to the Texas Department of Corrections for life."

MR. CONARD: That is –

THE COURT: Now, "The Court, the Attorney for the State or the Attorney for the Defendant may not inform a Juror or a prospective Juror of the effect of the failure of the Jury to agree on issues submitted under this Article."

MR. CONARD: I didn't tell them what the effect would be. I told them that that is one thing that they can tell the Judge. That does not tell them the effect of failing to answer.

MR. ARMSTRONG: He cannot tell them that they do not have to reach a verdict. That is what he is trying to do.

MR. CONARD: I can tell them that if twelve couldn't vote yes or ten couldn't vote no, I can tell –

MR. ARMSTRONG: They are instructed to either vote yes –

THE COURT: Or no. What you are telling [455] them, Frank, is that they don't have to do that. I never heard that argument before. I think it is a little dangerous, Frank. I don't believe I'd better let you –

MR. CONARD: If I had gone one step further –

THE COURT: It is –

MR. CONARD: – the effect, I would agree

THE COURT: It is pretty close. Of course, it doesn't come out here and say you can't do that, but, like Ernie says, if you are telling them they don't have to answer that, then that is really going against the Charge –

MR. CONARD: I am not –

THE COURT: – as you did –

MR. CONARD: – You don't have to answer, Judge. I am telling them if they can't vote twelve or they can't vote ten –

THE COURT: Well, go ahead the way you are, but don't tell them that you don't have to answer these questions or anything like that.

MR. CONARD: I am not going to tell them that.

THE COURT: Don't say you may not answer [456] that.

MR. ARMSTRONG: He can't tell them that they don't have to answer it.

THE COURT: That is what I am saying.

MR. ARMSTRONG: That is what he is trying to tell them is that they don't have to answer these questions.

THE COURT: Okay. Don't tell them that. I will sustain the objection.

[REPORTER'S NOTE: Court and Counsel then returned into the Juryroom and the following proceedings occurred in the presence and hearing of the Jury.]

THE COURT: All right. You may continue.

MR. CONARD: At any rate, ladies and gentlemen, the Charge is here for you to read and it tells you procedurally how you must answer the questions or what you must do before you can answer the questions and it is here for you to read in paragraph two.

The paragraph three basically tells you what [457] the Court will do, depending on your answers.

Paragraph four talks about, again, some of the things we talked about in voir dire and in opening arguments and all through. The right of the Defendant not to testify. And I call upon you again to not consider for any purpose, as the Charge tells you, the fact that Dorsie Johnson did not testify in this trial.

It also tells you down there at the bottom of the first page that you basically in considering the issues or answering them what you are to consider and that is all of the evidence, whether aggravating or mitigating, you see? So you are to consider all of it, whether to lessen the effect or increase the effect and that goes as to the first

part of the trial or the punishment phase. You should consider and consider appropriately all of it.

In paragraph five you will remember we talked about the law of parties and there was a Charge – a paragraph in the Charge on the guilt-innocence phase that told you about and defined for you what the law of parties was. Basically, if two people go in and do something, they are both responsible [458] for whatever the other one did.

You will see in paragraph five that that does not apply in the punishment phase. It does not apply in this phase in making your decisions and you are not to consider the law of parties. So that is one thing to observe.

And then, of course, the instructions that – you are not to consider, and we talked about this in voir dire, matters not in evidence and that includes and tells you specifically that you are not to discuss the possible action of the parole board or the Governor or any of those things. It is absolutely imperative that the only thing you can consider and use to consider in reaching your decision is the testimony you heard from the stand.

Again, you are told that you are the exclusive judges of the facts. It is up to you to decide the facts, the credibility of the witnesses and the weight to be given to their testimony, but you are bound to receive and follow the law as given you by the Court.

Again, I think the people that knew Dorsie throughout his life can give you their testimony, can give you strong guidance in making your decision.

[459] You have to decide here, basically, the appropriateness of the death penalty in this case; not in cases in

general, but in this case today from what you have heard. In deciding that you should, I think, remember that the family of Jack Huddleston is not the only victim of this thing that Dorsie did. His own family is a victim. His father is a victim. Dorsie is going to be punished.

The question – the real question, I think, is whether you believe that there is a possibility that he can change. You will remember that that was one thing every one of you told me you agreed – every one of you agreed with me that people can change. If you agree that people can change, then that means that Dorsie can change and that takes question two out of the realm of probability and into possibility, you see, because if he can change, then it is no longer probable that he will do these things, but only possible that he can and will do these things, you see.

If people couldn't change, if you could say I know people cannot change, then you could say probably. But every one of you knows in your heart and in your mind that people can and people do [460] change and Dorsie Johnson can change and, therefore, the answer to question two should be no.

The other thing you all told me was that what we have done in the past or a general course of conduct does not absolutely indicate what we will do in the future because people can change.

The state wants you to say, well, here is what his course of conduct was in the past; therefore, it is going to be this way in the future. What he says is he can't change. And you have all said to me on voir dire that people can change.

So then that is not probability, that is possibility and that means an answer of no to question two.

I think that after you have returned your verdict that – and I think it will be a difficult thing for you to do. I think it will require much thought and much study before you return this verdict because the evidence is not as overwhelming and what you have to decide here as it was on the guilt or innocence phase, you see. And now you are asked to speculate and predict the future and that is not as concrete as saying, well, did he do this, which he did.

[461] If Dorsie Johnson gets a death sentence, I may lay awake and wonder at night what did I not do? What did I forget to tell them? What did I forget to present to them that could have convinced them that another human life should not be taken to punish for the loss of Jack Huddleston?

I don't know whether any of you might wonder – might lay awake at night and wonder did we do the right thing? Is this the right thing?

I think that if you recognize that the evidence says that he may change and, therefore, question number two should be answered no and he gets a life sentence in the penitentiary that you can each go out of here knowing that you did the right thing and that you applied the evidence and followed the law and you can sleep soundly and comfortably in your own mind and conscience that you did exactly the right thing.

The Court's instructions tells you to go in, elect a Foreman, begin your deliberations. I would suggest that

in this case, because of the seriousness and the importance and the consequences of what your decision will be, that it might also be appropriate to begin your deliberations with a [462] prayer, whether it is a silent prayer by each one of you or outloud, but that you would need – that you would need the guidance of the Lord in making your decision so that you know that whatever decision you make will be the right decision.

Thank you, ladies and gentlemen.

THE COURT: Thank you, Mr. Conard.

Rebuttal by Texas

Mr. Armstrong.

MR. ARMSTRONG: Your Honor, if it please the Court, Mr. Conard –

MR. CONARD: Mr. Armstrong.

MR. ARMSTRONG: – ladies and gentlemen of the Jury, again I come to you for the last remarks that you will have to endure during this trial.

Now, I agree with Mr. Conard on a couple of matters and then we separate and I no longer agree.

The conduct of Dorsie Lee Johnson, Jr., the reprehensible and repulsive conduct of Dorsie Lee Johnson, Jr., in and of itself brings about an awesome task. I do not agree that it is a difficult task. I am not trying to lessen the struggle that you have with your own feelings nor to say you should lightly go into the Juryroom and flip-[463] pantly return a verdict in this case. But I tell you again each of you, having told this Judge, this Defense Attorney and the representative of the State of Texas, myself, that

you believe and agree with the law of the State of Texas that says in an appropriate case the death penalty is an appropriate punishment, you took an oath to follow the law and there is not – there will not ever be another case where the only appropriate penalty, where the just and proper penalty is a verdict that resulted in a sentence of death to the Defendant than exists in this case based on the evidence that you heard here.

You took an oath that you would uphold the law and you would render your verdict based upon the law, remembering that a man is responsible for the consequences of his own actions and when his own actions result in the killing, the taking of another human life, he has got to face the consequences.

I personally agree with the Legislature, but my feelings are not important or not a guide. But if all we had was one murder, one human being killing another human being with no more, the death penalty [464] might not be appropriate. But that is not what we have here. That is not what we have here.

This wasn't somebody he knew. This wasn't somebody he fought with. This wasn't somebody he argued with. This wasn't somebody who provoked him. This was Jack Huddleston, friendly, helpful husband, father, grandfather. The last two deeds we know that he committed – the last three deeds we know he did was to help a young girl, to be kind to a young girl who was starting her job that day, that morning. She spilled a Coke. "Don't worry about it, Susie. I'll clean it up. You have got your job. You go on."

Valton Buchannan, "See you tomorrow, V.L. Have a good day. Keep smiling."

And then the last thing we know he did was to help a young black girl and a young black man that he had never seen before try to figure out what they needed. "We need some motor oil, transmission fluid." "Sure, it is back over here on the right. What kind of car do you have?"

MR. CONARD: I object to that as injecting facts not in evidence and hearsay facts and I would ask that the Jury be instructed to disregard.

[465] MR. ARMSTRONG: Reasonable inference from the record and from the evidence and the confession of the Defendant as given.

THE COURT: Overruled.

MR. ARMSTRONG: Just part of the ruse, the premeditated, the deliberate actions of Dorsie Johnson. Took advantage of the man that was helping him. "Can't do it out here in the open. Doesn't have his pickup parked in front any more. The police might drive by. Got to get him in the cooler in the back. I want some orange juice and there is none here. I'll take a big jar of orange juice." "Well, sir, I have got to get it in the back."

Deliberate conduct, premeditated, cold-blooded, calculating killer. And he put him on the floor and killed him.

But that is not all we have in this case.

You recall – you may recall from the voir dire that the evidence in the case – of one case might in and of itself be sufficient to warrant the death penalty. I submit that the

manner in which Jack Huddleston was taken, the plan to take him and put him in that cooler, that cold storage unit and kill him showed a calculating, premeditating [466] deliberate killer at work. The kind who shows no remorse and who is able to and is likely to do it again.

In and of itself this crime would allow you, authorize you to answer these two special issues yes. The crime, the murder, the capital murder of Jack Huddleston in and of itself shows that the answers to those questions should be yes. But that is not all we have.

I have got to talk about deliberate for just a moment longer. Mr. Conard says to consider all of the evidence. There may be a reduction in the mental capacity because of drugs. Where is the evidence for you to consider? Where is the doctor who comes in and says that he is operating under diminished capacity?

MR. CONARD: Your Honor, we object to that as a proper argument. It calls for the Jury to speculate on evidence that is not – or facts not in evidence.

MR. ARMSTRONG: I am replying and answering the questions he raised. It is a reply to the Defendant's argument.

THE COURT: All right. This is rebuttal [467] argument so I will overrule the objection.

MR. ARMSTRONG: Thank you, Your Honor. Where is any evidence from the people he was with the next day? Donald Ray Robinson was with him the next day. Was there any evidence of diminished capacity?

First of all, you will recall or you should recall, I would ask you to recall, that even if somebody voluntarily took drugs or voluntarily became intoxicated, that is not a defense. That does not excuse nor make or change the fact that he is guilty of capital murder or lessen the punishment.

MR. CONARD: Your Honor, I object to that statement in that it implies to the Jury that they cannot consider that was a mitigating factor when, in fact, that is the law.

THE COURT: Of course, what he says is true, but the Jury may consider that as a mitigating factor if they wish.

MR. ARMSTRONG: Thank you, Your Honor.

MR. CONARD: Is my objection overruled?

THE COURT: Yes, overruled.

MR. CONARD: Thank you, Your Honor.

[468] MR. ARMSTRONG: Thank you, Your Honor.

Look in the evidence to see if there is any spot in the evidence for what Mr. Conard asked you to examine. There isn't. There is no evidence of that. But is there evidence to the contrary?

Donald Ray Robinson gave evidence that showed there was no mental – reduction in mental capacity. The evidence of Donald Ray Robinson showed that it was calculated, cold-blooded, without remorse.

"You want to see the money I got?" "Where did you get it?" "I robbed Allsup's Convenience Store." Diminished capacity? He remembers it well.

"Hey, man, you're crazy. They're going to identify you." "Ha, ha, ha, ha, dead men can't talk. I took care of that. I am not operating under diminished capacity now. I remember it. I took care of it so he wouldn't identify me. I had purpose and thought going into it. I acted deliberately so he couldn't identify me."

What was the result of that, that deliberate, planned out action on this part in killing Jack Huddleston? They didn't catch him. He got away with it until he tried it again and this time, although he shot the man in the face – think of [469] that for a moment. Stood here and shot the man in the face. His cohort stabbed him in the back and he beat him over the head with a hoe handle. Didn't kill him. Oh, he killed him, but he is not dead. He killed him. He is not dead. He would be better off dead, but that is not the end of it.

You see, he then told the police officers what he did. If he is acting under diminished capacity, he wouldn't be able to calculate and plan and do everything. But he told it with great particularity about what he did and how he did it and why he did it and who was in there and why he – what he did and said to them.

He remember [sic] when V. L. Buchannan came in. He put it in his statement. He remembered when the girls, the two while [sic] girls came in, one of them was drunk. He remembered going out and planning it again and waiting until they got some people out of there. And then if we want to say that he has remorse and that he is

acting out of diminished capacity, when he finally does get arrested, Ed Ramshur gives him the perfect opportunity to say, "Hey, man, I was stoned. I didn't know what I was doing. I'm sorry. I wish I hadn't done that. [470] I wish I was off drugs."

He gave him the perfect opportunity. He said "Dorsie, you had the man's money, you had him helpless, why did you kill him?" Perfect opportunity. All he had to do was say, "Hey, man, I was out of it. I didn't know." That wasn't the reason at all. Just like he told everybody else he did it so he could get away with it and go do it again.

He killed him on purpose, on purpose. No diminished capacity. He deliberately did it.

There are some factors that I think are worth considering in determining deliberateness, but I don't think there is any reason to spend much more time on deliberateness.

I think you knew Tuesday and Wednesday that he acted deliberately. Remember, the same evidence that shows intentional can and often does and in this case absolutely does show deliberateness.

What about the second question then? Mr. Conard wants to change the question. He wants to change the question. He wants you to ask has the State proved beyond a reasonable doubt that Dorsie Johnson cannot change? I want you to look at that [471] question when you go in there. Look at that question and if it asks that, if it asks has the State of Texas proved beyond a reasonable doubt that Dorsie Johnson cannot change, you knock on

that door, give the Bailiff a note and bring it out here and say, "Hey, it does."

Look at that question. Is there a probability that Dorsie Johnson will commit criminal acts of violence that constitute a continuing threat to society?

I submit to you, ladies and gentlemen, the State has already proved – I will back up.

Mr. Conard has already proved that Dorsie Johnson can and has changed –

MR CONARD: Your Honor, I object to that statement as improper argument in that it asks the Jury to apply a burden to the Defendant.

THE COURT: All right. I will sustain the objection.

MR. CONARD: I would ask the Court to instruct the Jury to disregard that argument.

THE COURT: All right. You will disregard the statement made that Mr. Conard is proving something.

[472] MR. CONARD: The Defendant would move for a mistrial, Your Honor.

MR. ARMSTRONG: Judge, if it please the Court –

THE COURT: The motion for mistrial will be denied.

Move on.

MR. ARMSTRONG: Thank you, Your Honor.

I am not asking you to hold any standard to that Defendant. I am merely telling you that the evidence

shows – Mr. Conard brought the evidence; not that he has to – he brought the evidence that shows that Dorsie Johnson has already changed.

I will let my sympathies play a part and I will feel sorry for Mr. Johnson, Sr. He taught that boy or tried to teach that young man what was right and wrong. He taught him, he told me that God gave each of us the ability to make a choice between right and wrong and further taught him that we each have to be responsible. We each are responsible for the consequences of our actions. And in spite of the fact that he took him to church, Dorsie Johnson changed and he has already changed and the State of Texas does not have one bit of [473] burden of proof to prove that he will change or that he will change or that he will not change.

The question is – I will back up.

I will agree that it is possible that he may change. Mr. Conard has asked most all of you, will you agree that it is possible for somebody to change. Would you agree that we cannot predict twenty or forty years down the road what somebody is going to be like? I will agree. I will agree.

How many more Jack Huddlestons, how many more Don Burrus do we have to put in the grave before concluding we can't wait for Dorsie Johnson to change again twenty or forty years from now?

Oh, Mr. Conard says, "You are going to remove him from society." He says, I think, that is what society means in that question number two that would constitute criminal acts of violence that would constitute a continuing

threat to society. You are going to remove him from society by giving him a life sentence. And so you have to answer the question no because he is nto [sic] going to be in society. Therefore, he cannot constitute a threat.

If that were what the law meant, then there is no question. You put him in the penitentiary [474] and under Mr. Conard's theory, you remove him, quote, you remove him from society, you have taken him out of society and put him away so he can't be a threat, if that is all the Legislature meant, then the mandatory sentence would be life.

Society, society may be defined as humans in general taken in relation one to another. he wants you to say that Dorsie Johnson is a human being, but I suppose the other human beings who have written hot checks of sufficient magnitude, who have committed an aggravated assault, who have committed burglary, the kinds of things that Mr. Conard says hasn't hurt anybody, his conduct hasn't hurt anybody, those human beings are going to be exposed to Dorsie Lee Johnson, Jr.

MR. CONARD: Your Honor, I object to that argument as improper in that it is a misstatement and misapplication of the law and that it requests the Jury to contemplate that that sentence and that word refers to persons in prison, in the penitentiary.

THE COURT: This term isn't defined. You have already argued what you think it is and he can argue what he thinks it is. I will overrule [475] the objection.

MR. ARMSTRONG: Thank you, Your Honor.

He said society – something like about society is for protection. I agree with that, too. If it is not protecting of the people who are in the penitentiary, who are paying for their crime as under the laws and the statutes that the Legislature has enacted that they are not entitled to protection, why do we have laws that says it is a crime to harm one of them or for one of them to harm the other one? Why do we have the laws that says it is a capital punishment, a capital punishment to kill a prison guard if they are not entitled to protection from somebody like Dorsie Lee Johnson, Jr.

This man shows no remorse. There is no evidence showing he shows remorse –

MR. CONARD: Your honor, I object to that.

MR. ARMSTRONG: Judge –

MR. CONARD: I am entitled to make my objection.

THE COURT: Let him make his objection.

MR. CONARD: In that it is a direct [476] comment on the failure of the Defendant to testify in this case.

MR. ARMSTRONG: That is absurd.

THE COURT: I don't interpret that the way Mr. Conard does. I will overrule the objection.

MR. ARMSTRONG: Thank you.

You have got all kinds of evidence in here that shows there is no remorse. I grant you that Mr. Johnson got on the stand and with Mr. Conard's leading him said, "yes,

he was sorry," but did you hear the rest of it? He was sorry for making his daddy cry. Never did his daddy say anything about him being sorry for killing Jack Huddleston or Don Burrus. Donald Ray Robinson, again, his testimony shows no remorse. And I want to know how in the world he can say these statements show remorse when they describe in intimate detail how he stretched the man out and killed him.

I see it, ladies and gentlemen, not as somebody spilling his heart, but an unremorseful, totally uncaring person spilling his guts. "I'm the meanest, toughest guy around and I went and killed Don Burrus, too." Oh, yeah, Don Burrus isn't dead, but he might as well be.

[477] Is he going to be a continuing threat to society? Is there a probability? It is not required that the State prove that he will not change. First of all, I don't believe it is possible for me to prove that he will not change because I believe the evidence for the last seven years shows he will not change. But let's bring people in and let's stick them here in groups and let's decide who is more likely to commit continuing acts of violence –

MR. CONARD: Your Honor, I object to that argument as improper Jury argument and invites the Jury to speculate upon facts and testimony and evidence and is not in evidence in this case.

THE COURT: Overruled.

MR. ARMSTRONG: Thank you, Your Honor.

In the first group you are told one of them has a prior criminal record – excuse me.

Would you help me, sir?

[REPORTER'S NOTE: The Bailiff assisted Mr. Armstrong in setting up the blackboard.]

[478] MR. CONARD: Your Honor, may I move so that I can see?

THE COURT: Yes.

MR. ARMSTRONG: Thank you, sir.

One of them has a prior criminal record. Is he more likely to commit other acts of violence in the future? Is he more likely to commit other acts of criminal violence in the future –

MR. CONARD: Your Honor, I object to that as being improper argument in that it asks the Jury to consider facts not in issue and not in evidence in this case.

THE COURT: I don't interpret it that way, Mr. Conard. I will overrule the objection.

MR. ARMSTRONG: Thank you, Your Honor.

The next group comes up and one of them as a bad reputation. Is he more likely to commit criminal acts of violence than those who don't?

Mr. Conard says –

MR. CONARD: I object to that as injecting improper argument and injects facts not in evidence for the Jury's consideration.

THE COURT: Well, if he doesn't tie it in later on, we will take a look at it. I think [479] I know what he is referring to. I don't see him going into anything outside the evidence except inferences and Jury argument. So I will overrule the objection.

MR. ARMSTRONG: Thank you, Your Honor.

Mr. Conard says – well, we will come back to that.

The next group comes in and you are told one of them has done other bad deeds before. He has committed other acts of violence –

MR. CONARD: Objection. That invites the Jury to speculate on facts not in evidence, Your Honor.

THE COURT: Overruled.

MR. ARMSTRONG: Who is more likely out of that group to continue to commit acts of violence.

The next group comes in and you are told that one of them out of that group has a bad temper. Who is more likely to commit acts of violence? Someone with a bad temper –

MR. CONARD: Object to that argument as an improper Jury argument and invites the Jury to speculate on facts not in evidence, Your Honor.

THE COURT: Overruled.

[480] MR. ARMSTRONG: The next group comes in. One of them, you are told, has a bad or an anti=social personality. He may tell somebody that he has dated several years before to do vile sexual acts upon him. Who is more likely to commit criminal acts of violence out of that group?

MR. CONARD: Objection. That is an improper argument and it invites the Jury to speculate on facts not in evidence, Your Honor.

THE COURT: Overruled.

MR. ARMSTRONG: The next group comes in. You are told that one of them shows no remorse for criminal conduct he has engaged in in the past. Who out of that group is more likely to commit continuing acts of violence?

MR. CONARD: Objection. That is an improper jury argument and invites the Jury to speculate on facts not in evidence, Your Honor.

THE COURT: Overruled.

MR. ARMSTRONG: Some of you may now know why my son can't write.

The next group comes in and you are told one of this group is involved with drugs. Who out of the group is more likely to engage in con [481] tinuing acts of criminal violence?

MR. CONARD: Object to the argument as an improper argument and invites the Jury to speculate upon facts not in evidence.

THE COURT: Overruled.

I don't know whether I can see that one, Mr. Armstrong.

MR. ARMSTRONG: I will tell you what it says, Judge.

The next group comes in and you are told that one of that group has previously committed crimes and been given an opportunity to be rehabilitated and has failed to

be rehabilitated in the past. Which one of that group is more likely to commit continuing acts of violence?

MR. CONARD: Object to the argument as improper in that it invites the Jury to speculate on facts not in evidence, Your Honor.

THE COURT: Overruled.

MR. ARMSTRONG: I think you would agree with me that in each of those groups you wouldn't have any difficulty in determining who was more likely to commit continuing acts of violence.

And then if you were told that the same one [482] in each of those groups, the ones that you were told had those traits, you would join me in saying that there is no doubt but that the only answer to number two, special issue number two, the only answer is yes.

Dorsie Johnson has a prior criminal record. Dorsie Johnson has a bad reputation.

First, Mr. Conard said that nobody except Rocky Salazar talked about his reputation. Rocky Salazar said back in school – remember, he said, "You mean at school?" His reputation was yes – his answer was yes. We didn't get into it after that.

Mr. Conard first said that nobody else talked about reputation. That is not true. Mrs. Dakan did. She is the owner of property and a business in Colorado City, Mitchell County, Texas. Yes, she is the mother of another victim of the criminal acts of violence of Dorsie Lee Johnson, Jr.

Paula Williams, you will recall she misunderstood the question. "Do you know his reputation for being a peaceful and law abiding citizen?" "No." "What do you mean no? You told me the other day you knew." "I know it. Don't you [483] remember I laughed when you asked that?" "What do you mean?" "No, he doesn't have a reputation for being peaceful and law abiding." "Oh, you do know his reputation?" "Yes." "And is that reputation good or bad?" "It is bad."

You want to tell me that Beverly Kay Johnson – he didn't ask her what his reputation was? Obviously, she didn't want to be up here. She didn't want to be up here telling the facts. She is going to do whatever she could. Dorsie Lee Johnson has for seven years – I tried to make a note each time one was proven – a whole page of bad acts by Dorsie Lee Johnson, Jr. –

MR. CONARD: Your Honor, I object to the District Attorney displaying his note sheet to the Jury and injecting his personal opinion by doing so to the Jury as improper argument.

THE COURT: I will state for the Jury that what the personal opinion of the District Attorney is is not binding upon you. He is making his argument from what he thinks the evidence shows just like Mr. Conard did. But you will not consider that – any of what Mr. Conard says or Mr. Armstrong says as evidence in this [484] case. They can point out to you what they think is evidence, but you are the sole judge of what the evidence shows.

MR. ARMSTRONG: Thank you, Your Honor.

MR. CONARD: Did the Court sustain my objection?

THE COURT: To that extent, yes.

MR. CONARD: And I move for an instruction to the Jury –

THE COURT: The Court has given that instruction. I just did. They are not to consider anything that the attorneys say as their personal opinions as being facts in this case.

MR. CONARD: I more for a mistrial.

THE COURT: Denied.

MR. ARMSTRONG: You may have made your own list. Does Dorsie Johnson have a bad temper? Ask his own friends. Paula Williams was in fear when, if a fit of temper, he went and grabbed an axe – an axe and threatened her.

Beverly Johnson broke down and started crying when talking about Dorsie Johnson's temper. He turned and threw that rock, a small brick was the way I describe it. It might have been my words, [485] but she agreed.

We talked about anti-social personality. It is involved in his bad temper. It is exhibited by his bad deeds and bad acts.

Recall the testimony of Beverly Kay Johnson about what started Dorsie Johnson into a fit of temper that almost led to an axe whipping.

We have been over no remorse for criminal conduct for any of these crimes – any of these crimes. You make your own list. All of the evidence shows no remorse.

Doyle Lowrance in twenty-six years of school work, "I have never seen this type of aggressive conduct by one student directed toward another student," he said.

What was Dorsie's attitude? Was it remorse? Did Dorsie ever express remorse? No. One involved with drugs. "It is the drug dealers that caused the crimes," says his daddy. That is what some of the evidence shows, but now [sic] always. There is no evidence of drugs when he decided to go get some more money from Don Burrus. And how much money did he get from Don Burrus? They got $25, $30 each. That is how much he values life. Shot him [486] in the face, hit him over the head, stabbed him in the back.

Failed to be rehabilitated in the past. Mr. Conard asked you to send him to the penitentiary where he will be rehabilitated. That is just the opposite of the usual Defense argument. Usually they don't want them in with other criminals because they are going to come out more hardened and more –

MR. CONARD: I object to that argument as improper. It asks for the Jury to consider facts not in evidence.

MR. ARMSTRONG: I am merely responding to his argument.

THE COURT: Yes. This is rebuttal argument. I think it is in response. I will overrule the objection.

MR. ARMSTRONG: Thank you.

His daddy whipped him. Did it do anything good? When he cut Rocky Salazar, did it do any good? No, ma'am. No, sir. He went back and cut Fred Dakan. He went back when he got off probation in the seventh grade and stabbed another friend. What is he going to do when he is through cutting [487] and stabbing his friends? He is going to shoot them in the head. That is what he is going to do.

And he went on to greater things, to burglaries and they caught him. And they said, "Young man, we are going to send you to the penitentiary if you don't rehabilitate. We are going to give you a second chance." And what did he do? He reported under the influence of marijuana to his probation officer, and his probation officer said, "Young man, we are going to give you a third chance." And what did he do? He reported under the influence of marijuana again.

Dorsie Johnson is the one in every group that came into the Courtroom and every time each factor is enough for us to say he is more likely to exhibit continuing acts of violence.

Two more thoughts and I will close. Never believe that when a preacher or a lawyer tells you that. I have got more.

Why should you answer special issue number two yes? That is the reason, but there are two other reasons. Two other reasons. All of his friends through their testimony, a common thread runs through it. He is a danger and you have got [488] to watch out. How can I say that?

Don Johnson, not a very good witness, was in Shakey's Pizza Parlor a week after he had killed Jack Huddleston and Dorsie Came in bragging – doesn't sound remorseful to me – bragging about trying to kill another man, shooting two times at him. Don Johnson, realizing that Dorsie Johnson is a threat, a continuing threat, "I didn't want to stay around and let him shoot me." His testimony, I didn't want to stay around and have him act crazy with me," same thing he said.

One friend. What about Paula Williams? From the time Dorsie Johnson was fifteen she tried to get him to stop taking drugs, take precautions. "You are a danger." What happened when he got mad at her? She took precautions and she stayed in that house. If he wasn't a danger, if he wasn't going to hurt her, why was she afraid and stayed in the house? Dorsie Johnson's friend says the answer to that question is yes.

Beverly Kay, Beverly Kay. She did go outside when he took the axe after Paula. What for? He wasn't mad at Beverly Kay. He was mad at Paula because she wouldn't do something vile and because [489] she wouldn't do something vile with him. And Beverly Kay went out there as a precaution, talked to him, tried to calm him down. Why? Because she knows the answer to that question is yes, there is a likelihood that he will do criminal acts of violence. Beverly Kay knows that the answer should be yes.

But she was in the Weekend Cafe and he got mad at her because she didn't want him smoking his dope and she left because she knew the answer to number two has to be yes. She had to get away, tried to get away and, of

course, she ran from him. Ran back in the house and took the kids back into the house that day she wanted to watch the V.C.R. and Dorsie had the gun.

Under Mr. Conard's questioning, she said the next time she went over there he was still mad at her for – from the Weekend Cafe when he tried to hit her with a brick, with a rock.

He called to her, to Beverly Kay, "Come in the house." And she opened the door and he was standing there with a – or sitting there, I don't recall what it was, with a gun pointed at her and she shut that door and got away because she knew the [490] answer to special issue number two is yes.

What about Donald Ray, Donald Ray Robinson? He helped Beverly Kay get out of that house – I'm sorry – out of that cafe. He put her in that car and after Dorsie had already fired and – not fired, but thrown one big rock at her, he sped off and left him on the side of the road. Why? Because he, too, know the answer to special issue number two is yes.

But the most damaging evidence that compels you to realize what his friends realized was Janet Miles. She got on the stand and said, "I gave my gun to Amanda." And as you sit and contemplate the answer to special issue number two, don't forget her words: "Amanda, don't let Dorsie have the gun," because she knew the answer to special issue number two.

One last thought. Deterrence: Mr. Conard says deterrence is not effective. some of you believe it is. I believe it

is. But whether I believe it is, again, has no value or import –

MR. CONARD: Object to the argument as improper in that the District Attorney has injected his personal opinion for the Jury.

[491] THE COURT: I believe he stated and I will tell the Jury again that his personal opinion is not to enter into your deliberations. You are not bound by that, by either attorney's.

MR. ARMSTRONG: Thank you.

MR. CONARD: Does the Court sustain my objection?

THE COURT: Yes.

MR. CONARD: The Court has instructed the Jury?

THE COURT: I do sustain the objection. I have instructed the Jury as to that.

MR. CONARD: Move for a mistrial. Your Honor.

THE COURT: Denied.

MR. ARMSTRONG: The Legislature has said that deterrence is one reason for punishment. Some of you believe and have said it is a reason for punishment. I want you to think about reverse deterrence. Reverse deterrence. You take away the only just and proper punishment that a case of this nature demands and all you have is a life sentence, the very same sentence given for aggravate [sic] robbery in an appropriate case.

[492] You tell Dorsie Lee Johnson, Jr. and you tell his friends and you tell anybody else of like mind. "If you commit an aggravated robbery and kill the man," you tell them by your verdict, "kill the man that way, you will have a chance of getting away with it and not being punished at all. There will be no witnesses and you will only get the same thing even if they catch you."

Then go tell that to Don Burrus' mother that it is all right. Go tell it to Mike Bailey not to worry about it, even though Dorsie Johnson said to him, "I'm going to get out and when I do, I'll get you."

Ladies and gentlemen, I think you can tell and have seen this week of the immense amount of work in investigation and effort that your law enforcement agencies have put forth to prove a case to you beyond any doubt and it is the Snyder Police Department, the Scurry County Sheriff's Office, the Texas Rangers, the Department of Public Safety, the Colorado City Policy Department and they have done a tremendous amount of work.

They still have one regret, one regret. They regret that they did not catch him before he did [493] it again.

MR. CONARD: Your Honor, I object to that argument as improper in that it asks the Jury to consider facts not in evidence.

MR. ARMSTRONG: It is a plea for law enforcement, Your Honor.

THE COURT: What facts are you referring to?

MR. CONARD: The fact that – what they regretted. There has been no testimony to any regret at all.

MR. ARMSTRONG: That is a reasonable and obvious inference from it.

THE COURT: All right. I think he can argue that. Overruled.

MR. ARMSTRONG: Thank you.

I don't want us to have the same regret while we wait twenty or forty years and count the Jack Huddlestons and Don Burrus and the man, whoever he was, that almost got shot at Shakey's.

Return a verdict, the only verdict, the only just and proper verdict that the law and the evidence requires in this case.

Thank you very much.

* * *

IN THE 132ND JUDICIAL DISTRICT COURT
IN AND FOR
SCURRY COUNTY, TEXAS

THE STATE OF TEXAS	*	
VS.	*	NO. 5575
DORSIE LEE JOHNSON, JR.	*	

STATEMENT OF FACTS
PUNISHMENT PHASE EXHIBIT VOLUME

INDEX

PUNISHMENT PHASE EXHIBIT VOLUME

STATE'S EXHIBIT NO. 52
(Disciplinary referral)
Shown 503

STATE'S EXHIBIT NO. 53
(Waiver of Appeal)
Shown 514

STATE'S EXHIBIT NO. 54
(Order of Probation)
Shown 523

STATE'S EXHIBIT NO. 55
(J-22 Jennings Pistol, .22 Caliber)
Shown 527

STATE'S EXHIBIT NO. 56
(Photograph)
Shown 528

STATE'S EXHIBIT NO. 57
(Photograph)
Shown 529

STATE'S EXHIBIT NO. 58
(Photograph)
Shown 530

STATE'S EXHIBIT NO. 59
(Photograph)
Shown 531

STATE'S EXHIBIT NO. 60
(Photograph)
Shown 532

STATE'S EXHIBIT NO. 61
(Photograph)
Shown 533

STATE'S EXHIBIT NO. 62
(Photograph)
Shown 534

STATE'S EXHIBIT NO. 63
(Photograph)
Shown 535

STATE'S EXHIBIT NO. 64
(Photograph)
Shown 536

STATE'S EXHIBIT NO. 65
(Photograph)
Shown 537

STATE'S EXHIBIT NO. 66
(Photograph)
Shown 538

STATE'S EXHIBIT NO. 67
(Photograph)
Shown 539

STATE'S EXHIBIT NO. 68
(Money found in Defendant's pockets)
Shown 540

STATE'S EXHIBIT NO. 69
(Defendant's Property)
Shown 541

STATE'S EXHIBIT NO. 70
(Knife)
Shown 542

STATE'S EXHIBIT NO. 71
(Front of Cash Register Drawer)
Shown 543

STATE'S EXHIBIT NO. 72
(Red wrench)
Shown 545

STATE'S EXHIBIT NO. 73
(Meat fork)
Shown 546

STATE'S EXHIBIT NO. 74
(Pliers)
Shown 547

STATE'S EXHIBIT NO. 75
(Voluntary Statement)
Shown 548

DEFENDANT'S EXHIBIT NO. 1
(School Records)
Shown 549

DISCIPLINARY REFERRAL
COLORADO MIDDLE SCHOOL
12th & Chestnut Street
Phone: 728-2673

Johnson, Dorsie — Illegible
7
Date of Incident — Teacher
9-7-79 — Rees

Time
3:20

PARENT OR GUARDIAN NOTIFICATION

The following Report is to notify the parent or guardian that the above student is charged with an infraction of discipline.

Please feel free to request additional information as to the incident or the corrective action taken.

INFRACTION

_ Not reporting after school as directed
_ Unauthorized absence from class
_ No textbook or class materials
_ Chronic class tardiness
✓ Prone to mischief
✓ Disturbing class or other pupils
_ Damaged school property
_ Disrespectful or discourteous
✓ Antagonistic towards class routine

ACTION TAKEN

- Pupil's record examined
- Parental conference
- ✓ Student conference arranged
- ✓ Pupil verbally corrected
- Detained after class or after school
- Guidance Counselor referral
- Assigned different seat
- Parental conference arranged
- Assigned to new class

RECOMMENDATION

- Infraction filed
- Reimbursement for damage allowed
- ✓ Warning issued
- Indefinite Suspension
- Assigned after school time to be made up
- Suspended for ___ days
- Assigned Probationary Status
- Referred to

3 licks given – Lowrance

Comment(s) See attached note

PARENT'S COPY

/s/ Illegible
Authored Signature Title

State Exibit
52

* * *

Colorado Middle School
12th & Chestnut Street
Colorado City, Texas 79512

728-2673

Doyle Lowrance
Principal

Sept. 10, 1979

Mr. & Mrs. Dorsie Johnson
361 Sherman St.
Colorado City, TX 79512

Dear Mr. & Mrs. Johnson:

Dorsie was brought to the office by Mrs. Rees for giving the "finger" in class. This is just one of the many problems teachers are having with Dorsie in class. On 9-4-79, he gave trouble to a substitute teacher in Language Arts. On the same day, he was brought to the office by Mrs. Ress. (A report of this visit was mailed home). On 9-5-79, Dorsie was observed cutting line in the cafeteria. He was the only student doing so. I sent Dorsie to the end of the line. On 9-6-79, Dorsie was observed running from the main building to the cafeteria. He was again sent to the end of the line. (This incident involved some 5 or 6 boys).

These incidents along with others reported by teachers, are leading to a very serious problem. If Dorsie continues to act in this way, it will lead to suspension from class privileges.

Please feel free to call or come to school to discuss in greater details, these problems.

Cordially yours,

/s/ Doyle Lowrance
Doyle Lowrance
Principal

cc/ Charlie Uselton
Superintendent of Schools

DISCIPLINARY REFERRAL
COLORADO MIDDLE SCHOOL
12th & Chestnut Street
Phone: 728-2673

Johnson, Dorsie

Illegible
7

Date of Incident
9-17-79

Date
9-18-79

Time

Teacher
Coach Gainey

PARENT OR GUARDIAN NOTIFICATION

The following Report is to notify the parent or guardian that the above student is charged with an infraction of discipline.

Please feel free to request additional information as to the incident or the corrective action taken.

INFRACTION

_ Not reporting after school as directed
_ Unauthorized absence from class
_ No textbook or class materials
_ Chronic class tardiness
_ Prone to mischief
_ Disturbing class or other pupils
_ Damaged school property
_ Disrespectful or discourteous
_ Antagonistic towards class routine
_ Illegible

ACTION TAKEN

_ Pupil's record examined
_ Parental conference
_ Student conference arranged
_ Pupil verbally corrected
_ Detained after class or after school
_ Guidance Counselor referral
_ Assigned different seat
_ Parental conference arranged
_ Assigned to new class

RECOMMENDATION

_ Infraction filed
_ Reimbursement for damage allowed
_ Warning issued
_ Indefinite Suspension
_ Assigned after school time to be made up
_ Suspended for ___ days
_ Assigned Probationary Status
_ Referred to _____

Comment(s) See Attached Letter

Illegible

TEACHER'S COPY
/s/ Doyle Lowrance
Authored Signature Title

DISCIPLINARY REFERRAL
COLORADO MIDDLE SCHOOL
12th & Chestnut Street
Phone: 728-2673

Johnson, Dorsie

Illegible
Date

Date of Incident
10-10-79

Teacher
Brown

Time
1:55

PARENT OR GUARDIAN NOTIFICATION

The following Report is to notify the parent or guardian that the above student is charged with an infraction of discipline.

Please feel free to request additional information as to the incident or the corrective action taken.

INFRACTION

_ Not reporting after school as directed
_ Unauthorized absence from class
_ No textbook or class materials
_ Chronic class tardiness
_ Prone to mischief
_ Disturbing class or other pupils
_ Damaged school property
_ Disrespectful or discourteous
_ Antagonistic towards class routine
_ Illegible

ACTION TAKEN

_ Pupil's record examined
_ Parental conference
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_ Parental conference arranged
_ Assigned to new class

RECOMMENDATION

_ Infraction filed
_ Reimbursement for damage allowed
_ Warning issued
_ Indefinite Suspension
_ Assigned after school time to be made up
_ Suspended for ___ days
_ Assigned Probationary Status
_ Referred to _____

Comment(s) Dosie stabbed Dennis Illegible in the hand with a pencil. He made a stabbing motion at his stomach and then stabbed him in the hand. Dorsey said it was an accident.

TEACHER'S COPY

/s/ Doyle Lowrance Prin.
Authored Signature Title

Date: 9-17-79

Coach Gainey called me at home at about 8:30 p.m. He told me about Dorsie cutting Rocky Salazar with a piece of glass. The incident took place before workout on the morning of 9-17-79. Rocky didn't tell Coach Gainey what happened until his sister brought him to Coach Gainey that afternoon. Rocky went to the hospital and had the cut sewed up. (Rocky didn't know how many stitches were needed).

Date 9-18-79 (7:45 a.m.)

I talked to Rocky early this morning about the problem. Rocky told me that Dorsie told him that he was going to cut him and he did cut Rocky on the back with a piece of broken glass. Rocky didn't tell Coach Gainey what happened because Dorsie told him he would cut him again.

(9:20 a.m.)

I talked to Coach Gainey about the problem. He said that Dorsie admitted that he did cut Rocky. Coach Gainey gave Dorsie three licks for conduct that is totally unacceptable by an athlete or by any student at CMS. I told Coach to send Dorsie and Rocky to my office as soon as they were dressed.

(9:30 a.m.)

Gary Marsh told me that he had seen Dorsie cut Rocky on the back. He didn't hear anything and he doesn't know why.

Dorsie told me that he was just playing and he didn't mean to cut Rocky but that it was an accident.

Rocky said again that Dorsie grabbed him by the shirt and told him he was going to cut him. He then cut Rocky through the shirt on the back of his left shoulder.

Action taken:

Dorsie is suspended for a period of three days. He will be allowed to return to school on 9-22-79 at 9:30 a.m.

Possible action for future problems:

1. Additional three day suspensions
2. Suspension for the current semester (this would be done by School Board action).

/s/ Doyle Lowrance
Doyle Lowrance
Principal
Middle School
Colorado City, TX

Colorado Middle School
12th & Chestnut Street
Colorado City, Texas 79512

728-2673

Doyle Lowrance
Principal Sept. 21, 1979

Mr. Dorsie Johnson
361 Sherman St.
Colorado City, TX 79512

Dear Mr. Johnson:

The following is a summary of the conference held on September 21, 1979, concerning Dorsie's problems at Colorado Middle School.

Items discussed:

1. Lack of homework
2. Behavior problems
3. Improvement that must be made by Dorsie

Recommendations:

1. Dorsie will be allowed to return to school for a probation period that will end on October 10, 1979.
2. Dorsie must prove, by his efforts and actions that improvement is evident.
3. A current report will be discussed on October 10, 1979, at 10:00 a.m. at a meeting in Mr. Uselton's office.
4. The probation will be removed at that time if an acceptable report is given.
5. Dorsie's effort and behavior at school must continue past this probationary period to insure continued enrollment in school.

Possible future action:

1. Automatic suspension if Dorsie is sent to the Principal's office for any reason before October 10, 1979.
2. Suspension for a period of time not to exceed the current semester.
3. Suspension from school.

Cordially,
/s/ Doyle Lowrance
Doyle Lowrance
Principal

Colorado Middle School
12th & Chestnut Street
Colorado City, Texas 79512

728-2673

Doyle Lowrance
Principal

To: Mr. Uselton
Superintendent of Schools
Colorado City
and
Mr. Johnson

Report on: Dorsie Johnson

September 25, 1979 12:50 p.m.

Edward Cannon came to my office and reported that Dorsie had pushed him and caused him to stumble, down three or four steps in the main building. Edward complained of a hurt thumb and knee that he hit on one of the steps. I checked and found three witnesses that said they saw Dorsie push Edward. The witnesses were Treva Russell, Johnny Martinez, and Dennis Pfeuffer.

I got Dorsie out of class and brought him to the office. Edward changed his story and said he was not absolutely sure that Dorsie was the one that pushed him. When Edward made this statement the students were dismissed and sent back to class.

September 25, 1979 3:25 p.m.

Dorsie was set to my office by Mrs. Rees for misbehavior in class. I talked to Dorsie a few minutes, looked at the note and test paper that Mrs. Rees sent over, and then dismissed him so he would not miss the bus. Dorsie told

me he was giggling in class but it was not his fault. He said some of his classmates made him giggle.

No decision was made at this time in order to give me a chance to talk to Mrs. Rees in detail about the problem. At 3:35, Mrs. Rees came over to my office and we discussed the situation.

Mrs. Rees had told Dorsie to leave the room and come to my office at about 3:10. The reason for this was that the class was taking a test and Mrs. Rees could not leave them alone. Dorsie had been giggling throughout the first part of the test and had answered one question in the first thirty minutes of class. Dorsie did not come to my office at this time but simply walked out in the hall out of sight of Mrs. Rees. Mrs. Gierhart, a teacher in the next room, had to step out in the hall and tell Dorsie to get quiet. Mrs. Rees then found out that Dorsie had not come to my office as directed and at this time, he was told again to come to the office which he did.

Mrs. Rees explained the part about the classmate that had made a funny remark at the beginning of the class at 2:45. This student was sent to the hallway to complete the test at about 2:55.

Dorsie was not sent to the office until about 3:10 after he continued to do nothing but giggle throughout the test.

Mrs. Rees also said that the giggling had been somewhat a problem all along and had not improved since his return to class on 9-21-79.

The teachers were not aware of the probationary status of Dorsie. They were not told because I felt this would not allow for a normal situation to exist. Dorsie was aware of

the situation and knew what was expected of him at all times.

/s/ Doyle Lowrance
Principal
Colorado Middle School

Dorsey suspended until 10:00, October 10, 1979

Colorado Middle School
12th & Chestnut Street
Colorado City, Texas 79512

728-2673

Doyle Lowrance
Principal

APRIL 3, 1980

Conference with Dorsie Johnson, Fred Dakan, Weldon Hartsfield, Coach Welch, Coach Zamarippa

The conference concerned the problem that occurred on the afternoon of April 2, 1980, during cross-country running.

Dorsie, Fred and Weldon were together on the service road next to I-20. Fred said that the three were walking together and he said something about his legs hurt. He said Dorsie told him he could help the hurting and made a swipe at the back of Fred's legs with a piece of glass. It made a scratch on the left leg and cut the right leg.

Dorsie confirmed Fred's statements but said he was only playing. He also said that others were picking up glass along the road.

Weldon said that he saw Dorsie cut Fred but did not hear Dorsie or Fred say anything.

I suspended Dorsie for nine days until April 17, 1980.

/s/ Doyle Lowrance
DOYLE LOWRANCE

No. 5575

THE STATE OF TEXAS	§	IN THE 132ND
	§	JUDICIAL
VS.	§	
	§	DISTRICT COURT OF
DORSIE LEE JOHNSON, JR.	§	
	§	SCURRY COUNTY,
	§	TEXAS

DEFENDANT'S OBJECTION NUMBER 1

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, Dorsie Lee Johnson, Jr., in the above-styled and numbered cause, after the evidence having been heard and both sides having closed, and the Court having prepared and submitted the Charge to the Defendant for examination and prior to the reading of said Charge to the jury and arguments of counsel to the jury, the Defendant hereby files this his Objection to said Charge:

> The evidence is insufficient to support the submission of special issue number 1 and special issue number 2.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Court sustain this Objection and amend the Court's Charge accordingly.

Respectfully submitted,

/s/ Frank Conard, II
Frank W. Conard, II
121 East Third
Sweetwater, Texas 79556
(915) 236-6864
State Bar No. 04655700

ATTORNEY FOR DEFENDANT

No. 5575

THE STATE OF TEXAS	§	IN THE 132ND
	§	JUDICIAL
VS.	§	
	§	DISTRICT COURT OF
DORSIE LEE JOHNSON, JR.	§	
	§	SCURRY COUNTY,
	§	TEXAS

ORDER

On this day, the Defendant having properly and timely filed his Objection Number 1 to the Court's Charge before the Court's Charge was read to the jury and before arguments of counsel, the Defendant's Objection 1 to the Court's Charge and is hereby (~~GRANTED~~) (DENIED, to which action of the Court the Defendant duly excepts in writing in open Court prior to the reading of the Main Charge to the jury).

SIGNED AND ENTERED this the 14 day of Nov., 1986.

/s/ George L. Duling
Judge Presiding

No. 5575

THE STATE OF TEXAS	§	IN THE 132ND
	§	JUDICIAL
VS.	§	
	§	DISTRICT COURT OF
DORSIE LEE JOHNSON, JR.	§	
	§	SCURRY COUNTY,
	§	TEXAS

DEFENDANT'S OBJECTION NUMBER 2
AND SPECIALLY REQUESTED
INSTRUCTION NUMBER 2

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, Dorsie Lee Johnson, Jr., in the above-styled and numbered cause, after the evidence having been heard and both sides having closed, and the Court having prepared and submitted the Charge to the Defendant for examination and prior to the reading of said Charge to the jury and arguments of counsel to the jury, the Defendant hereby files this his Objection to said Charge:

> First objection to Special Issue #2 in the Court's Charge in that such charge does not require the jury to base their decision on felony crimes, aggravated crimes, or deadly crimes.
>
> Second objection to Special Issue #2 in the Court's Charge in that as worded such special issue invites the jury to speculate as to the length of time the defendant would spend in jail on a life sentence before parole.

The Defendant specially requests that the following instruction be submitted in the Charge of the Court:

Requested submission in place of Special Issue #2 as set out in the Court's charge as follows:

2.

(a) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing, *deadly* threat to society.

Answer: ___ Yes or ___ No

(b) Whether the aggravating circumstances outweigh the mitigating circumstances so as to render improbable that the defendant can be rehabilitated?

Answer: ___ Yes or ___ No

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Court include the foregoing Specially Requested Instruction in the Court's Main Charge and sustain this Objection and amend the Court's Charge accordingly.

Respectfully submitted,

/s/ Frank Conard, II
Frank W. Conard, II
121 East Third
Sweetwater, Texas 79556
(915) 236-6864
State Bar No. 04655700

ATTORNEY FOR DEFENDANT

No. 5575

THE STATE OF TEXAS	§	IN THE 132ND
VS.	§	JUDICIAL
	§	
DORSIE LEE JOHNSON, JR.	§	DISTRICT COURT OF
	§	
	§	SCURRY COUNTY, TEXAS

ORDER

On this day, the Defendant having properly and timely filed his Objection to the Court's Charge Number 2 and Request for Special Instructions Number 2 before the Court's Charge was read to the jury and before arguments of counsel, the Defendant's Objection to the Court's Charge and Request for Special Instructions is hereby (~~GRANTED~~) (DENIED, to which action of the Court the Defendant duly excepts in writing in open Court prior to the reading of the Main Charge to the jury).

SIGNED AND ENTERED this the 14 day of Nov., 1986.

/s/ George L. Duling
Judge Presiding

No. 5575

THE STATE OF TEXAS	§	IN THE 132ND
	§	JUDICIAL
VS.	§	
	§	DISTRICT COURT OF
DORSIE LEE JOHNSON,	§	
JR.	§	SCURRY COUNTY,
	§	TEXAS

DEFENDANT'S OBJECTION NUMBER 3
AND SPECIALLY REQUESTED
INSTRUCTION NUMBER 3

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, Dorsie Lee Johnson, Jr., in the above-styled and numbered cause, after the evidence having been heard and both sides having closed, and the Court having prepared and submitted the Charge to the Defendant for examination and prior to the reading of said Charge to the jury and arguments of counsel to the jury, the Defendant hereby files this his Objection to said Charge:

> Objection to the Court's Charge on the grounds that it in effect instructs the jury as to consideration of the State's evidence, but fails to provide instruction as to mitigating evidence and as such is a comment by the Court on the weight of the evidence.

The Defendant specially requests that the following instruction be submitted in the Charge of the Court:

> "You may take into consideration all of the evidence, whether aggravating or mitigating in nature, if any, submitted to you in the full trial of the case, that is, all of the evidence submitted

> to you in the trial of the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, whether mitigating or aggravating in nature, if any, admitted before you in the second part of the trial wherein you are called upon to determine the special issues hereby submitted to you."

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Court include the foregoing Specially Requested Instruction in the Court's Main Charge and sustain this Objection and amend the Court's Charge accordingly.

Respectfully submitted,

/s/ Frank Conard, II
Frank W. Conard, II
121 East Third
Sweetwater, Texas 79556
(915) 236-6864
State Bar No. 04655700

ATTORNEY FOR DEFENDANT

No. 5575

THE STATE OF TEXAS	§	IN THE 132ND
	§	JUDICIAL
VS.	§	
	§	DISTRICT COURT OF
DORSIE LEE JOHNSON, JR.	§	
	§	SCURRY COUNTY,
	§	TEXAS

ORDER

On this day, the Defendant having properly and timely filed his Objection to the Court's Charge Number 3 and Request for Special Instructions Number 3 before the Court's Charge was read to the jury and before arguments of counsel, the Defendant's Objection to the Court's Charge and Request for Special Instructions is hereby (GRANTED) as amended (~~DENIED~~, to which action of the Court the Defendant duly excepts in writing in open Court prior to the reading of the Main Charge to the jury).

SIGNED AND ENTERED this the 14 day of Nov., 1986.

/s/ George L. Duling
Judge Presiding

No. 5575

THE STATE OF TEXAS	§	IN THE 132ND
	§	JUDICIAL
VS.	§	
	§	DISTRICT COURT OF
DORSIE LEE JOHNSON, JR.	§	
	§	SCURRY COUNTY,
	§	TEXAS

DEFENDANT'S OBJECTION NUMBER 4
AND SPECIALLY REQUESTED
INSTRUCTION NUMBER 4

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, Dorsie Lee Johnson, Jr., in the above-styled and numbered cause, after the evidence having been heard and both sides having closed, and the Court having prepared and submitted the Charge to the Defendant for examination and prior to the reading of said Charge to the jury and arguments of counsel to the jury, the Defendant hereby files this his Objection to said Charge:

> The Charge fails to include the following instruction:
>
> "The jury is instructed that *only the conduct of the defendant* can be considered at the punishment phase, and that the instructions pertaining to the law of parties given at the guilt stage cannot be considered."

The Defendant specially requests that the following instruction be submitted in the Charge of the Court:

> The jury is instructed that *only the conduct of the defendant* can be considered at the punishment phase, and that the instructions pertaining to

the law of parties given at the guilt stage cannot be considered.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Court include the foregoing Specially Requested Instruction in the Court's Main Charge and sustain this Objection and amend the Court's Charge accordingly.

Respectfully submitted,

/s/ Frank Conard, II
Frank W. Conard, II
121 East Third
Sweetwater, Texas 79556
(915) 236-6864
State Bar No. 04655700

ATTORNEY FOR DEFENDANT

No. 5575

THE STATE OF TEXAS	§	IN THE 132ND
VS.	§	JUDICIAL
	§	
DORSIE LEE JOHNSON, JR.	§	DISTRICT COURT OF
	§	
	§	SCURRY COUNTY,
	§	TEXAS

ORDER

On this day, the Defendant having properly and timely filed his Objection to the Court's Charge Number 4 and Request for Special Instructions Number 4 before the Court's Charge was read to the jury and before arguments of counsel, the Defendant's Objection to the Court's Charge and Request for Special Instructions is hereby (GRANTED) (~~DENIED~~, to which action of the Court the Defendant duly excepts in writing in open Court prior to the reading of the Main Charge to the jury).

SIGNED AND ENTERED this the 14 day of Nov., 1986.

/s/ George L. Duling
Judge Presiding

No. 5575

THE STATE OF TEXAS	§	IN THE 132ND
	§	JUDICIAL
VS.	§	
	§	DISTRICT COURT OF
DORSIE LEE JOHNSON, JR.	§	
	§	SCURRY COUNTY,
	§	TEXAS

DEFENDANT'S OBJECTION NUMBER 5
AND SPECIALLY REQUESTED
INSTRUCTION NUMBER 5

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, Dorsie Lee Johnson, Jr., in the above-styled and numbered cause, after the evidence having been heard and both sides having closed, and the Court having prepared and submitted the Charge to the Defendant for examination and prior to the reading of said Charge to the jury and arguments of counsel to the jury, the Defendant hereby files this his Objection to said Charge:

> Objection to the Court's charge in that it fails to define "deliberately," having already defined "intentionally", the two words being synonyms in common useage, thereby allowing the jury to answer special issue number one without reflecting on any difference there may be in the two words as used in the charge, and as such constitutes a comment by the Court on the weight of the evidence.

The Defendant specially requests that the following instruction be submitted in the Charge of the Court:

> (1) As used in the first special issue, the word "deliberately" has a meaning different and distinct from the word "intentionally" as that word was previously defined in the charge on guilt, and
>
> (2) The word "deliberately" as used in the first special issue means a manner of doing an act characterized by or resulting from careful consideration: "A conscious decision involving a thought process, conduct which embraces more than mere will to engage in the conduct."

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Court include the foregoing Specially Requested Instruction in the Court's Main Charge and sustain this Objection and amend the Court's Charge accordingly.

Respectfully submitted,

/s/ Frank Conard, II
Frank W. Conard, II
121 East Third
Sweetwater, Texas 79556
(915) 236-6864
State Bar No. 04655700

ATTORNEY FOR DEFENDANT

No. 5575

THE STATE OF TEXAS	§	IN THE 132ND
	§	JUDICIAL
VS.	§	
	§	DISTRICT COURT OF
DORSIE LEE JOHNSON, JR.	§	
	§	SCURRY COUNTY,
	§	TEXAS

ORDER

On this day, the Defendant having properly and timely filed his Objection to the Court's Charge Number 5 and Request for Special Instructions Number 5 before the Court's Charge was read to the jury and before arguments of counsel, the Defendant's Objection to the Court's Charge and Request for Special Instructions is hereby (~~GRANTED~~) (DENIED, to which action of the Court the Defendant duly excepts in writing in open Court prior to the reading of the Main Charge to the jury).

SIGNED AND ENTERED this the 14 day of Nov., 1986.

/s/ George L. Duling
Judge Presiding

No. 5575

THE STATE OF TEXAS	§	IN THE 132ND
	§	JUDICIAL
VS.	§	
	§	DISTRICT COURT OF
DORSIE LEE JOHNSON, JR.	§	
	§	SCURRY COUNTY,
	§	TEXAS

DEFENDANT'S OBJECTION NUMBER 6

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, Dorsie Lee Johnson, Jr., in the above-styled and numbered cause, after the evidence having been heard and both sides having closed, and the Court having prepared and submitted the Charge to the Defendant for examination and prior to the reading of said Charge to the jury and arguments of counsel to the jury, the Defendant hereby files this his Objection to said Charge:

> Objection to the submission of the verdict form permitting jury to assess the death penalty because under the facts of the particular case, said punishment would be cruel and unusual and excessive punishment, in violation of the Texas Constitution and the Constitution of the United States.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Court sustain this Objection and amend the Court's Charge accordingly.

Respectfully submitted,

/s/ Frank Conard, II
Frank W. Conard, II
121 East Third
Sweetwater, Texas 79556
(915) 236-6864
State Bar No. 04655700

ATTORNEY FOR DEFENDANT

No. 5575

THE STATE OF TEXAS	§	IN THE 132ND
VS.	§	JUDICIAL
	§	
DORSIE LEE JOHNSON, JR.	§	DISTRICT COURT OF
	§	
	§	SCURRY COUNTY,
	§	TEXAS

ORDER

On this day, the Defendant having properly and timely filed his Objection Number 6 to the Court's Charge before the Court's Charge was read to the jury and before arguments of counsel, the Defendant's Objection to the Court's Charge and Request for Special Instructions is hereby (~~GRANTED~~) (DENIED, to which action of the Court the Defendant duly excepts in writing in open Court prior to the reading of the Main Charge to the jury).

SIGNED AND ENTERED this the 14 day of Nov., 1986.

/s/ George L. Duling
Judge Presiding

No. 5575

THE STATE OF TEXAS	§	IN THE 132ND
	§	JUDICIAL
VS.	§	
	§	DISTRICT COURT OF
DORSIE LEE JOHNSON, JR.	§	
	§	SCURRY COUNTY,
	§	TEXAS

DEFENDANT'S OBJECTION NUMBER 7

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, Dorsie Lee Johnson, Jr., in the above-styled and numbered cause, after the evidence having been heard and both sides having closed, and the Court having prepared and submitted the Charge to the Defendant for examination and prior to the reading of said Charge to the jury and arguments of counsel to the jury, the Defendant hereby files this his Objection to said Charge:

> Objection to the Charge of the Court in that the Charge fails to contain special issue number 3 as set forth in Article 37.071 of the Texas Code of Criminal Procedure as follows:
>
> "If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, in any, by the deceased."
>
> The failure to include such charge does not allow the jury to determine the evidence raised, if any.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Court sustain this Objection and amend the Court's Charge accordingly.

Respectfully submitted,

/s/ Frank Conard, II
Frank W. Conard, II
121 East Third
Sweetwater, Texas 79556
(915) 236-6864
State Bar No. 04655700

ATTORNEY FOR DEFENDANT

No. 5575

THE STATE OF TEXAS	§	IN THE 132ND
	§	JUDICIAL
VS.	§	
	§	DISTRICT COURT OF
DORSIE LEE JOHNSON, JR.	§	
	§	SCURRY COUNTY,
	§	TEXAS

ORDER

On this day, the Defendant having properly and timely filed his Objection Number 1 to the Court's Charge before the Court's Charge was read to the jury and before arguments of counsel, the Defendant's Objection 1 to the Court's Charge and Request for Special Instructions is hereby (~~GRANTED~~) (DENIED, to which action of the Court the Defendant duly excepts in writing in open Court prior to the reading of the Main Charge to the jury).

SIGNED AND ENTERED this the 14 day of Nov., 1986.

/s/ George L. Duling
Judge Presiding

NO. 5575

THE STATE OF TEXAS	§	IN THE 132ND
	§	JUDICIAL
VS.	§	
	§	DISTRICT COURT OF
DORSIE LEE JOHNSON, JR.	§	
	§	SCURRY COUNTY,
	§	TEXAS

CHARGE OF THE COURT

MEMBERS OF THE JURY:

You have found the Defendant, Dorsie Lee Johnson, Jr., guilty of capital murder committed on the 23rd day of March, 1986, in Scurry County, Texas. It is now necessary for you to determine from all the evidence presented the answers to Special Issues in this charge. You are further instructed that:

1

The punishment for capital murder is mandatory and is either life in prison or death.

2

The burden of proof in this part of the trial rests on the State and never shifts to the Defendant. Each issue submitted to you must be proven beyond a reasonable doubt before it can be answered "yes". If the jury unanimously determines that the State has proven an issue beyond a reasonable doubt, then the Foreman shall

record the jury's answer by signing his name to that answer on the verdict form.

You are further instructed that if any juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be "yes", then such juror should vote "no" to that Special Issue.

If ten (10) or more jurors vote "no" to any Special Issue, then the answer of the jury shall be "no" to that issue and the Foreman shall so record the jury's answer by signing his name to the verdict form reflecting such answer.

3

You are further instructed that if the jury returns affirmative or "yes" answer to all the Issues submitted, this Court shall sentence the Defendant to death. If the jury returns a negative or "no" answer to any Issue submitted, the Court shall sentence the Defendant to life in prison.

4

You are instructed that the Defendant may testify in his own behalf if he chooses to do so, but if he elects not to do so, that fact cannot be taken by you as a circumstance or evidence against him or prejudice him in any way. The Defendant has elected not to testify in either stage of the trial, and you are instructed that you cannot and must not refer to, allude to, or consider that fact for any purpose during your deliberations.

In determining each of these Issues, you may take into consideration all the evidence submitted to you in the trial of this case, whether aggravating or mitigating in nature, that is, all the evidence in the first part of the trial when you were called upon to determine the guilt or innocence of the Defendant and all the evidence, if any, in the second part of the trial wherein you are called upon to determine the answers to the Special Issues.

5

The jury is instructed that only the conduct of the Defendant can be considered at the punishment phase, and that the instructions pertaining to the law of parties given at the guilt stage cannot be considered.

6

During your deliberations you must not discuss nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about the fact or person connected with this case not presented by the evidence.

During your deliberations you are not to consider or discuss any possible action of the Board of Pardons and Paroles or of the Governor, or how long the defendant would be required to serve to satisfy a sentence of life imprisonment.

You are the exclusive judges of the facts proved and the credibility of the witnesses and the weight to be given

to their testimony, but you are bound to receive and follow the law as given you by the Court.

/s/ Gene L. Dulaney
Gene L. Dulaney
Judge
132nd District Court

NO. 5575

THE STATE OF TEXAS	§	IN THE 132ND
	§	JUDICIAL
VS.	§	
	§	DISTRICT COURT OF
DORSIE LEE JOHNSON, JR.	§	
	§	SCURRY COUNTY,
	§	TEXAS

The Special Issues with a signature line for your Foreman to indicate your answers:

SPECIAL ISSUE ONE

Was the conduct of the Defendant, Dorsie Lee Johnson, Jr., that caused the death of the deceased, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

ANSWER TO SPECIAL ISSUE ONE

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to Special Issue One is "yes".

/s/ R. E. Barbee
Foreman of the Jury

OR

We, the jury, find and determine that the answer to Special Issue One is "No" because at least ten (10) jurors have a reasonable doubt about the matter inquired about.

Foreman of the Jury

SPECIAL ISSUE TWO

Is there a probability that the Defendant, Dorsie Lee Johnson, Jr., would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER TO SPECIAL ISSUE TWO

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to Special Two is "yes".

/s/ R. E. Barbee
Foreman of the Jury

OR

We, the jury, find and determine that the answer to Special Issue Two is "No" because at least ten (10) jurors have a reasonable doubt about the matter inquired about.

Foreman of the Jury

VERDICT

We, the jury, return in open court, the answers to the Two Special Issues submitted to us, and the same is our verdict in this case.

/s/ R. E. Barbee
Foreman of the Jury

NO. 5575

THE STATE OF TEXAS	§	IN THE 132ND
VS.	§	JUDICIAL
	§	
DORSIE LEE JOHNSON, JR.	§	DISTRICT COURT OF
	§	
	§	SCURRY COUNTY,
	§	TEXAS

JUDGMENT

On the 13th day of October, 1986, this cause was called for trial and the State appeared by her District Attorney, Ernie B. Armstrong, and the Defendant appeared in person and his counsel, Frank W. Conard, II, also being present, and both parties announced ready for trial and the State having made known that it would seek the death penalty in this cause and the Defendant having been heretofore arraigned and pleaded NOT GUILTY to the charge contained in the indictment herein; and it appearing to the Court that the Defendant was mentally competent and the Defendant having been charged in the indictment with capital murder, thereupon a jury of good and lawful men and women, to-wit: R.E. Barbee, and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read, and the Defendant's plea of NOT GUILTY thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the Defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterward were brought into open Court on the 12th day of November, 1986, by the

proper officer, the Defendant and his counsel being present, and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit:

"We, the Jury, find the Defendant, Dorsie Lee Johnson, Jr., guilty of capital murder as charged in the indictment.

R. E. Barbee
Foreman"

The Defendant having been found guilty by verdict of the jury of capital murder committed on the 23rd day of March, 1986, and the jury having heard all the evidence and argument of counsel and being again charged by the Court retired to consider its verdict and after due deliberation returned into open court on the 14th day of November, 1986, with their answers to the following issues and their verdict:

Special Issue One – Was the conduct of the Defendant, Dorsie Lee Johnson, Jr., that caused the death of the deceased, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

Answer To Special Issue One:

"We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to Special Issue One is "yes".

R. E. Barbee

Foreman of the Jury"

RECORDED IN CRIMINAL MINUTES
VOLUME 15 PAGE 165

Special Issue Two – Is there a probability that the Defendant, Dorsie Lee Johnson, Jr., would commit criminal acts of violence that would constitute a continuing threat to society?

Answer To Special Issue Two:

"We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to Special Issue Two is "yes".

R. E. Barbee
Foreman of the Jury"

And the Court duly accepted the verdict and ordered the same to be filed. Upon the receipt of the jury verdict the Court then discharged the jurors and preceded to sentence the defendant, Dorsie Lee Johnson, Jr., as follows, to-wit:

The Defendant, Dorsie Lee Johnson, Jr., was asked by the Court whether he had anything to say why sentence should not be pronounced against him and the Defendant answered nothing in bar thereof. The Court proceeded in the presence of the said Defendant, Dorsie Lee Johnson, Jr., and his counsel of record, Frank W. Conard, II, and pronounced sentence against him as follows:

IT IS THE ORDER OF THE COURT that you, the Defendant, Dorsie Lee Johnson, Jr., who has been adjudged to be guilty of capital murder as found by the jury in the indictment, it being mandatory that your punishment be death, it is therefore the order of this Court that your punishment be death and before the hour

of sunrise on a date to be determined by this Court upon a mandate of affirmance issued by the Texas Court of Criminal Appeals at the State penitentiary at Huntsville, Texas, you be caused to die by intravenous injection of substance or substances in a lethal quantity sufficient to cause your death and until you, the said Dorsie Lee Johnson, Jr., are dead. Said execution procedure to be determined and supervised by the Director of the Texas Department of Corrections and that the Clerk of this Court issue a death warrant in accordance with this sentence directed to the Director of the Texas Department of Corrections, or in case of his death, disability or absence, the Warden of the Huntsville Unit of the Texas Department of Corrections, or in the event of the death, disability or absence of both such Director and Warden, then to such other person as is appointed by the Board of Directors of the Texas Department of Corrections for that purpose and to deliver such warrant to the Sheriff of the County of Scurry, State of Texas, to be delivered by him to the said Director of the Texas Department of Corrections, together with the said Dorsie Lee Johnson, Jr., and the said Dorsie Lee Johnson, Jr., is remanded to jail to await transportation to the Texas Department of Corrections at Huntsville, Texas, and execution of this sentence.

/s/ Gene L. Dulaney
Gene L. Dulaney, Judge Presiding

November 14, 1986
Date Signed

DORSEY LEE JOHNSON, JR., Appellant
NO. 69, 750, v. -Appeal from Scurry County
THE STATE OF TEXAS, Appellee

OPINION

This is a direct appeal from a conviction of capital murder. V.T.C.A., Penal Code, Section 19.03(a)(2). Appellant was convicted of intentionally causing the death of Jack Huddleston in the course of committing and attempting to commit the offense of robbery. Upon finding appellant guilty of capital murder, the jury affirmatively answered the special issues under Article 37.071(b)1 and 2, V.A.C.C.P. Punishment was then assessed at death. We will affirm.

Appellant alleges seven points of error which we will addresss in the order in which they arose at trial. Appellant does not assert any sufficiency challenges, therefore, recitation of the facts is not required. We do, however, find a brief synopsis of the events which occurred in March 1986, appropriate.

In the early morning hours of Sunday, March 23, 1986, appellant and his accomplice, Amanda Miles, decided to commit a robbery at the Allsup's convenience store in Snyder. After planning the crime deciding that there should be no witnesses, and waiting for the store to clear of customers, the pair entered the store. On the pretext of wanting a particular item, appellant lured Huddleston, the clerk, back to the cooler where he was told this was a robbery and to lie face down on the floor. Appellant then shot the clerk in the back of the neck with a .25 caliber pistol, killing him. Amanda Miles emptied out the cash drawer taking approximately $160.00 (one

hundred sixty dollars). Two cartons of cigarettes were also taken.

Appellant was arrested in April for a subsequent robbery and attempted murder of a store clerk in the neighboring town of Colorado City. It was in the course of investigating this latter offense that appellant confessed to the capital offense committed in Snyder.

In his seventh point of error, appellant alleges that the trial court erred in failing to grant his motion for change of venue. Appellant asserts that the pretrial publicity of his case prevented him from receiving a fair trial, the result of which denied him the right to equal protection and due process. See Article 31.03, V.A.C.C.P.

When a motion for change venue has been denied the standard of review to be applied by appellate courts is whether after review of the record the evidence reflects the trial court abused its discretion in refusing the motion Phillips v. State, 701 S.W.2d 875 (Tex.Cr.App. 1987) cert. denied 477 U.S. 909 (1986). This abuse of discretion must be determined in light of whether outside influences affecting the community climate concerning a particular defendant were inherently suspect. Shepard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Phillips*, 701 S.W.2d at 879.

Merely because a case is publicized is not, in and of itself, a sufficient reason to change venue – a venire need not be completely ignorant of the facts and circumstances which surround a particular case. Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Eckert v. State, 623 S.W.2d 359 (Tex.Cr.App. 1981) (overruled on other grounds by Reed v. State, 744 S.W.2d 112

(Tex.Cr.App. 1988)). A further factor to be considered is the passage of time. Where a period of time has passed between the publicity complained of and the time of trial, such delays tend to negate the inference that publicity would affect the climate of opinion in a community. Nethery v. State, 692 S.W.2d 686 (Tex.Cr.App. 1985) cert. denied, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986); Adami v. State, 524 S.W.2d 693 (Tex.Cr.App. 1975).

Therefore, where the evidence is not sufficient to show that in the community there existed a pervasive feeling that the ability of the movant to receive a fair trial by an impartial jury was doubtful, then the decision rendered by the trial court to deny such a motion will not be disturbed on appeal. Beets v. State, ___ S.W.2d ___ (Tex.Cr.App. No. 69,583, September 21, 1988) slip op. p. 28.

In October, 1986, a hearing was held on appellant's motion for change of venue. Accompanying appellant's motion were ten affidavits from residents of Scurry County. In each affidavit, the affiant swore that in their opinion appellant could not receive a fair trial in the community. However at the hearing, the seven compurgators which appeared testified on cross-examination, that they had changed their minds and now thought appellant could receive a fair trial. In additional support of his motion, and aside from the affidavits attached thereto, appellant introduced into evidence, through several representatives of the local media, news articles printed in newspapers and heard on the radio in Scurry County. The coverage consisted of some 14 to 16 articles of various sizes covering a variety of topics from the actual murder at the time it occurred to a suppression

hearing held shortly before the change of venue hearing and selection of the jury.

The State pointed out through cross-examination of these witnesses that the reporting of the case was fair, non-inflammatory and for the purpose of informing the public of a current event. These witnesses also testified that they believed appellant could receive a fair trial.

The State brought forth seven witnesses from various areas of the county who testified that they had not heard any or at least had heard only very little discussion about the case since its occurrence in March. The medial coverage had little effect on them or on any of the people they knew. Additionally, these witnesses testified that it was their opinion that appellant could receive a fair and impartial trial from a jury made up of Scurry County residents. At the close of evidence and final statements the trial court denied appellant's motion for change of venue.

In reviewing the testimony adduced at the hearing we find that the evidence supports the decision made by the trial court. The record reflects that the type and fashion of reporting was not of the requisite character as to create a suspect environment which would prevent the rendering of a fair trial, thereby depriving appellant of equal protection and due process of law.

Here it was not demonstrated that the publicity was anything other than an accurate reporting of an unusual occurence [sic] in Scurry County. There was no evidence of any prejudicial or inflammatory remarks made in any of the articles. Additionally, the publicity complained of herein took place over the course of more than six months

since the murder and nearly six months since appellant's arrest.

Therefore, the trial court did not abuse its discretion in denying the motion for change of venue. As a result, appellant's seventh point of error is overruled.

Appellant, in his second point of error, alleges that the trial court committed error in denying his challenge for cause of veniremember Nachlinger. Appellant asserts that Nachlinger had already formed a conclusion as to appellant's guilt. See Article 35.16(a)(10), V.A.C.C.P.

In making a determination as to the propriety of rulings on challenges for cause of this variety, the Court will review and determine if the trial court abused its discretion in light of the entire examination of the veniremember. That is, whether the record reflects the evidence tends to reasonably support the trial court's implied findings that the veniremember would be able to perform the tasks that are assigned to jurors in this State. See Hernandez v. State, 757 S.W.2d 744 (Tex.Cr.App. 1988).

Nachlinger testified that he would follow the law as proscribed by the oath and would render a verdict based solely upon the evidence presented at trial. Nachlinger understood the concept of proof beyond a reasonable doubt and would require the State to provide that proof, otherwise he would return a verdict of not guilty.

During the State's voir dire examination the following colloquy took place regarding the prospective juror's feelings on presumption of innocence:

"Q. [Prosecutor] do you understand that that indictment is not evidence that he is guilty. It cannot be used or even considered to be evidence that he is guilty?

"A. Yes, sir.

"Q. Do you understand that?

"A. Yes.

"Q. Having been charged with that offense, it merely means that we can go to trial and try to prove our case. He is presumed innocent and will remain innocent and presumed innocent until such time as the State produces evidence which shows beyond a reasonable doubt that he is guilty.

"A. Yes, sir.

"Q. All right. Do you have any problems with the presumption of innocence that the law affords to any individual?

"A. No, sir. That's fair.

"Q. Would agree you would afford that presumption to this defendant? You have not yet determined in your own mind because you have not heard any evidence and you understand the principle that he is presumed innocent at this time as he sits here in the Courtroom. He is innocent and he is not guilty because there has been no proof.

"A. Yes."

During appellant's voir dire examination, Nachlinger was asked about an answer he entered on his questionnaire regarding his personal philosophy, in which he wrote, "[t]he man killed another man who was holding

down an honest job. I see little need in a trial." When asked whether he remembered specifics about the crime he said he did not, except that he had heard there was a confession and that is why he had written in that response. When questioned further on his feelings regarding appellant's guilt or innocence the following transpired:

"Q. [Appellant] In your heart now – this is not an abstract thing, but how do you really feel inside?

"A. Well, if you know- if I was listening to this and reading what I have read, if he can be proven otherwise, you know, I'm not completely ironed in on one thing anywhere, but, you know, I have been known to change my mind and I can do it. You know, I'm willing to listen to anything. But, like I say, you know, didn't sound real good.

"Q. Well, again, what you say, if it can be proven otherwise, that is – and you said that you heard that he gave a confession and you have heard people talking about and you have heard that it was a cinch deal and what that kind of tells me is that you must have felt that at some point or at least when you wrote this paper out that Dorsie Johnson must be guilty of this. Is that how you felt when you – I mean just general feelings inside and not thinking about what the State has to prove and this and that, but just how you actually felt?

"A. Well, sir, I suppose so.

"Q. Is that – I suppose so. Do you think that that is really an accurate answer: yes or no?

"A. Yes, sir.

* * *

"Q. Do you think that that conclusion and that idea that you have already set up in your mind and expressed by even saying, 'I see little need in a trial,' you think that would influence your actions and your deliberations and your decision if you were on the Jury?

"A. Well, I hope it wouldn't, but I'm sure it probably could.

"Q. In other words, are you saying –

"A. Yes, sir I think I could. I don't know you know.

* * *

"A. Well, you know, you say I have formed a conclusion here. If I was going to take what I have already read and just, you know, pass a verdict now, it would probably be a guilty verdict. But if I was to get on this deal here and, you know, I mean that's not a cut and dried thing in my mind right now, you know. I believe I could go in here open minded, you know. I'd try to do it the best I could.

* * *

"Q. Honestly and from your feelings and not from abstract ideas, but just from your heart?

"A. Well, I'm – you know, I know what you're getting at here. I know what I wrote down on the questionnaire and all, but, well – you know, you just kind of leading it around and I feel like I've told you now two or three times, but I don't really know how to go ahead and tell you is what I'm getting at. I feel like I've already told you this a couple of times, you know. I don't

know really what you're hunting or pushing on here.

* * *

"Q. Do you understand that if a person – if those conclusions from a person or yourself or any Juror influences their decision – in other words, if it caused you to say, well, I think he is guilty, but if he can convince me he is not, you understand that person would have the duty not to be on that Jury?

"A. Yes, sir.

"Q. And do you feel that you would fit that category because of that reason?

[No response]

"Q. Of course, there is nothing wrong with it if you fit that category and because you have read all of those things or heard people talking about them, there is nothing wrong with that. If you feel that you would then that is what I would like to know.

"A. Yes, sir. I believe it could have some effect on my judgment.

"Q. You think – I hate to keep pushing. You say it could have. Do you think it would have?

"A. Yes, sir."

It was at this time that appellant challenged veniremember Nachlinger for cause on the ground that Nachlinger had already formed an opinion as to appellant's guilt. Article 35.16(a)(10), V.A.C.C.P. The judge overruled the challenge and allowed further questioning by the State which drew another objection from appellant

in that pursuant to Article 35.16(a)(10), supra, no further questioning should be allowed.[1] This objection was overruled[2] and examination by the State continued in part as follows:

"Q. [Prosecutor] All right. Now, then, do you know anything – know anything that tells you beyond a reasonable doubt at this time that Dorsie Johnson is the one that committed this crime?

"A. No, sir.

"Q. And would you require the State, that is me and my witnesses, to prove to you beyond a reasonable doubt that this Dorsie Johnson is the one that committed the crime before you found this Dorsie Johnson guilty?

"A. Yes, sir. It'd have to be proven to me."

Nachlinger stated that the State would have to prove appellant's guilt beyond a reasonable doubt, that he

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[1] Appellant also objected based on Article 35.16 (a)(8), which allows for the discharge of a veniremember due to the fact "he had served on a petit jury in a former trial of the same case." There is no evidence in the record to support such an objection nor is this raised in appellant's appeal. Therefore, we need not determine its validity.

[2] Appellant raises the failure of the trial court to suspend examination and discharge Nachlinger pursuant to Article 35.16(a)(10), as a part of his second point of error being discussed herein Although Nachlinger was "unequivocal" in one particular response, when viewed in the context of the preceding examination, the record reflects that Nachlinger was anything but "unequivocal" as to whether, in his opinion, the conclusion regarding appellant's guilt would influence his verdict. Therefore, the trial court did not err in allowing further questioning.

understood the presumption of innocence and would abide by it and that he would render a verdict based upon the evidence adduced at trial. There is sufficient evidence in the record to support the trial court's implied finding of fact that Nachlinger was a qualified juror. Therefore, the trial court did not abuse its discretion in overruling appellant's challenge for cause. Nethery v. State, 692 S.W.2d 686 (Tex.Cr.App. 1985) cert denied, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986); Barefoot v. State, 596 S.W.2d 875 (Tex.Cr.App. 1980) cert denied, 453 U.S. 913, 101 S.Ct. 3146, 69 L.Ed.2d 996 (1981). Appellant's second point of error is overruled.

In appellant's sixth point of error he alleges that the trial court erred in denying his challenge for cause as to veniremember Bruner. Appellant alleges that Bruner could not consider a life sentence in a capital case and as a result demonstrated a prejudice against the law applicable to appellant and upon which he was entitled to rely. Article 35.16(c), (2), V.A.C.C.P.

The standard of review in these circumstances turns on whether the trial court abused its discretion by overruling the challenge for cause. In determining abuse of discretion, this court shall review the record and determine if it supports the trial court's implied finding that the prospective juror's views would not "prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and oath." Cockrum v. State, 758 S.W.2d 577 (Tex.Cr.App. 1988) cert. denied ___ U.S. ___, ___ S.Ct. ___, 57 U.S.L.W. 3588 (1989); *Hernandez*, 575 S.W.2d at 752.

The examination of Bruner regarding the imposition of sentence revealed that Bruner would not automatically vote "yes" when answering the punishment questions because not every murder deserved the death penalty, although she felt that a capital crime deserved the death penalty. She stated that she would wait to hear all of the evidence presented at punishment before determining the answers to the punishment questions.

During appellant's examination, Bruner was asked if she would answer the punishment questions "yes" so appellant would receive the death penalty which Bruner had stated was the only proper punishment for a capital crime. To this she responded:

> "A. I'll put it like – if I answered all of these yes because the State proved it, I would answer them all yes. . . . [b]ut if it is not proven to me to answer all of these yes, I'll put one no, yes, or maybe two, whatever. Right now I can't answer that, really."

On further examination by the State, Bruner reiterated that as to the punishment questions, she would not automatically answer them "yes" thereby disregarding the evidence presented. She understood her oath and stated that she would not violate it just so the death penalty could be imposed.

The court, in an effort to clear up any ambiguities in her answers regarding punishment engaged in the following discussion:

[Trial court]

"Q. You would still vote no? Would you still vote no knowing it would possibly be life if you voted no?

"A. Right.

"Q. If it was [sic] failed to be proven to you that it should be yes, could you vote no?

"A. On the second phase – yes, on the second phase. Yes, sir, if its proven.

* * *

"Q. You haven't answered my question. Could you vote no if it was not proven to you that –

"A. Yes.

"Q. – that you can vote yes –

"A. Yes, I could vote no.

"Q. You would do that if the evidence did not show it to be yes?

"A. Yes, sure, I would."

Based on the totality of the voir dire, it is evidence that Bruner would listen to all of the evidence, put her personal feelings aside, and answer the punishment questions based upon that evidence. Although, she initially would have answered the questions "yes" if appellant were found guilty, after the veniremenber[sic] understood the process involved she testified that she would listen to the evidence provided at the punishment phase and would answer the special issue questions on punishment accordingly. As a result, there is sufficient evidence in the record to support the trial court's determination that Bruner's beliefs would not substantially impair her abilities as a juror in light of the instructions and oath.

Hernandez v. State, 757 S.W.2d 744 (Tex.Cr.App. 1988). The trial court, therefore, did not abuse its discretion in overruling appellant's challenge for cause of veniremember Bruner. Appellant's sixth point of error is overruled.

Appellant's fourth point of error alleges that the trial court erred in sustaining the State's challenge for cause of veniremember Graves. Appellant asserts that it was not sufficiently shown that Graves would automatically answer the punishment questions in the negative. See Article 35.16(b)(1), (3), V.A.C.C.P.

In determining whether a potential juror was properly excused for cause due to his or her views on capital punishment, it must be determined if the trial court abused its discretion in its action regarding the veniremember in light of the record. Only where the record supports the trial court's determination that those views would prevent or substantially impair that veniremember's duties in light of the instructions and oath, will the decision made by the trial court be undisturbed on appeal. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); Hernandez v. State, 757 S.W.2d 744, (Tex.Cr.App. 1988); Sharp v. State, 707 S.W.2d 611 (Tex.Cr.App. 1986) cert. denied, ___ U.S. ___, 109 S.Ct. 190, 102 L.Ed.2d 159 (1988).

In the present case, after having had the process explained to him, Graves stated that regardless of what the evidence proved he would answer one of the punishment questions "no" so as to not be a participant in the rendering of a death sentence. Graves, in his responses, went on to illustrate that if faced with such a decision as

between the oath and his conscience, he would prefer not to take the oath rather than swear to perform a duty which he could not undertake.

During examination by appellant, Graves stated that he would follow the law in deciding the three punishment issues. Subsequently appellant was asked the following question:

> "Q. Okay. I kind of keep going back, I guess, to the answers of the – if you were a Juror and asked to deliberate on the punishment on a capital crime, again, it would be in the instance where a person was convicted of a capital crime and you were talking about punishment and that being punishment set by the answers to these three questions, could you, in fact, follow your oath to listen to the evidence and decide on the evidence and weigh the evidence and then put an answer – then go ahead and answer these three questions as the evidence indicated?
>
> "A. Yes, but if it meant answering yes to all three, I couldn't because I really don't feel like the death penalty is appropriate."

The mere fact that a prospective juror states that they would not, under any circumstances, answer the punishment questions in the affirmative for any reason, is not, in and of itself, sufficient to disqualify a juror. Hernandez, v. State, 757 S.W.2d 744 (Tex.Cr.App. 1988). However, after review of the record we find that it clearly reflects a "substantial likelihood that [Grave would] balk at the task or falsify an answer" and therefore the trial court committed no error in finding that Graves was unqualified to be a juror. *Id.* It is evident that Graves' views on crime and punishment would substantially impair his

abilities to carry out his duties as a juror in accordance with the oath and instructions necessitated by Texas law. *Id.* at 754. Therefore, as the trial court committed no error, appellant's fourth point of error is overruled.

Appellant in his first point of error alleges that the trial court *sua sponte* excused veniremember Walker over his objections and without a challenge for cause by either party.

Although this is true, appellant mischaracterizes the trial court's action by calling it a *"sua sponte"* excusal. Cf. Green v. State, 764 S.W.2d 242 (Tex.Cr.App. 1989); Nichols v. State, 754 S.W.2d 185 (Tex.Cr.App. 1988) cert. denied, ___ U.S. ___, 109 S.Ct. 819, 102 L.Ed.2d 808 (1989); Rougeau v. State, 738 S.W.2d 651 (Tex.Cr.App. 1987) cert. denied ___ U.S. ___, 108 S.Ct. 1586, 99 L.Ed.2d 901 (1988); Moore v. State, 542 S.W.2d 664 (Tex.Cr.App. 1976) cert. denied 431 U.S. 949, 97 S.Ct. 2666, 53 L.Ed.2d 266 (1977). The Texas Code of Criminal Procedure provides that once a juror is sworn to answer truthfully to the questions to be asked during voir dire, "the court shall then hear and determine excuses offered by prospective jurors for not serving as a juror and if sufficient, discharge those members of the venire." Articles 35.02 and 35.03, V.A.C.C.P.

In the case before us, the State, in the course of examining Walker, inquired into several matters including whether she had responded affirmatively to a question regarding the care and custody of a child under the age of ten years. Walker explained that the child was her grandson and that he stayed with her during the school year so he may attend school locally rather than in Grand

Prairie where his mother lived.[3] She stated that he was eight yeas old and was currently being cared for by a friend while she was at the courthouse for this proceeding. The attorneys elicited from Walker that although her friend could care for the child during the course of the trial and although she characterized her grandson as very independent, if the trial lasted for the expected one to four weeks, she would have a difficult time keeping her mind on the trial. She stated that she wanted to do her civic duty and would like to be on a jury for a trial that would not be so lengthy. Veniremember Walker also stated that if she were a defendant in a criminal trial she would not want a juror who had her state of mind sitting on her jury panel.

The court then told Walker that if she wanted to be excused for these reasons that he would excuse her, if however, she wanted to serve on this jury then she may as she was qualified. The veniremember chose not to serve and asked to be excused. The court excused Walker, expressly pursuant to Article 35.03, over appellant's objection.

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[3] Although it appears that the excuse raised by veniremember Walker is more along the lines of an exemption as per Section 62.106(2) of the Government Code, which states that a person qualified to serve as a juror may nonetheless establish an exemption from service if he has legal custody of a child or children younger than 10 years of age and that service requires leaving them without adequate supervision. We find that this exemption was not raised, therefore, we do not decide the applicability of the exemption, i.e., "legal custody," to grandmothers, such as veniremember Walker.

The objections raised by appellant began with an assertion that the trial court and prosecutor were seeking to exclude Walker because she was black, the same race as the appellant. That the testimony elicited by the State was intended for the sole purpose of having this veniremember excused because she was black. Additionally, appellant objected to the fact that the trial court was excusing her when there was no valid challenge for cause from either party and that the court was doing so based on her testimony which appellant felt was not sufficient to justify her excusal. We disagree.

As previously set out, Article 35.03 provides that it shall be the court that hears and determines the sufficiency of excuses for not serving as a juror. As the legislature has placed this responsibility and discretion upon the trial judges of this state, review of their decisions on appeal shall be whether such a decision constituted an abuse of discretion. That is, does the record reasonably reflect a tendency to support the trial court's holding. Where the record so reflects, decisions as to the sufficiency of excuses and the propriety of excusals rendered by trial courts shall not be disturbed on appeal. However, we feel that the exercise of this authority by trial judges should be jealously guarded and relied upon, not by the parties, but by the judges as a last resort for excusing, what would otherwise be, a proper juror. Cf. Nichols v. State, 754 S.W.2d 185 (Tex.Cr.App. 1988) cert. denied, ___ U.S. ___, 109 S.Ct. 819, 102 L.Ed.2d 808 (1989); Rougeau v. State, 738 S.W.2d 651 (Tex.Cr.App. 1987) cert. denied ___ U.S. ___, 108 S.Ct. 1586, 99 L.Ed.2d 901 (1988); Moore v. State, supra. Appellant's first point of error is overruled.

Appellant's fifth point of error alleges trial court error in overruling appellant's challenge for cause as to veniremember Kiker on the grounds that Kiker could not consider age as a mitigating factor at punishment. See Article 35.16(c)92), V.A.C.C.P.

Appellant misconstrues the law when he characterizes Kiker's inability to consider age as a mitigating factor as a prejudice against the law applicable to the appellant's case. Although not cited in the briefs of either party, this Court has recently determined that it is not error for a trial court to overrule a challenge for cause where it is shown that a juror will not or may not give a particular variety of "mitigating evidence" any consideration. Cuevas v. State, 742 S.W.2d 331 (Tex.Cr.App. 1987) cert. denied ___ U.S. ___, 108 S.Ct. 1488, 99 L.Ed.2d 716 (1988); Cordova v. State, 733 S.W.2d 175 (Tex.Cr.App. 1987), cert. denied ___ U.S. ___, 108 S.Ct. 1488, 99 L.Ed.2d 716 (1988).

The United States Supreme Court has not yet mandated that jurors *must* give any amount of weight to any particular piece of evidence that might be offered in mitigation of punishment. *Cordova*, 733 S.W.2d at 189. What the Court has decided is that the factfinder must not be precluded or prohibited from considering any relevant evidence offered in mitigation of the punishment to be assessed, or in answering the punishment questions. *Cordova* at 189, citing Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). See also *Cuevas*, 742 S.W.2d at 345. What this means is the factfinder must be allowed to hear the evidence and to act

upon it. Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

In Texas, this mitigating evidence is admissible at the punishment phase of a capital murder trial. See Article 37.071, V.A.C.C.P. Once admitted, the jury may then give it weight, if in their individual minds it is appropriate, when answering the questions which determine sentence. *Adams*, 448 U.S. at 46. However, "[t]he amount of weight that the factfinder might give any particular piece of mitigating evidence is left to 'the range of judgment and discretion' exercised by each juror." *Cordova* at 189, quoting Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); *Cuevas*, 742 S.W.2d at 346.

During the voir dire examination of Kiker, she stated that as between a nineteen year old defendant with the maturity of a twenty-five year old versus a nineteen year old defendant with the maturity of a twelve year old, that as to punishment these people should be treated the same.

It was this inability to consider "either mental age or physical age" as a mitigating factor that appellant based his challenge. The trial court overruled appellant's challenge for cause finding that it was not a proper ground for disqualification.

The mere fact that a prospective juror, during voir dire, acknowledges that in their mind such evidence deserves little or no weight, does not create a sustainable challenge for cause under Article 35.16. See *Cuevas*, 742 S.W.2d at 345; *Cordova*, 733 S.W.2d at 189. We find the trial court committed no error in its ruling. Appellant's fifth point of error is overruled.

Lastly, appellant's third point of error alleges the trial court erroneously granted the State's challenge for cause to veniremember Guzman. Appellant asserts that it was not clear from the record that Guzman could not read or write.[4] Article 35.16(a)(11), V.A.C.C.P.

First, it has long been the law of this state that the statutory requirement that jurors be able to read and write meant something more then [sic] the mere ability to "write his name and nothing more." Hernandez v. State, 506 S.W.2d 884 (Tex.Cr.App. 1974). Rather, the prospective juror should possess the ability to express their ideas in words upon paper. *Hernandez* at 887 citing Johnson v. State, 17 S.W. 252 (1886). This is a determination which rightfully belongs to the trial court and, absent an abuse of discretion, such a finding will not be disturbed on appeal. Garcia v. State, 581 S.W.2d 168 (Tex.Cr.App. 1979) (vacated and remanded on other grounds, 453 U.S. 902 (1981)).

During the State's examination of prospective juror Guzman, she stated that she could read but not very well since the extent of her education went no further then the fourth grade. In regards to the juror questionaire [sic],

---

[4] The State was sustained on two separate challenges for cause of veniremember Guzman. The first regarding her ability to read and write and the second that she possessed a conscientious scruple against infliction of the death penalty as well as a bias or prejudice against the law upon which the State was entitled to rely. Article 35.16(b)(1),(3), V.A.C.C.P. Appellant objected to both challenges. As we find the first challenge under Article 35.16(a)(11) proper, we need not address the merits of the second challenge for cause sustained by the trial court and complained of herein by appellant.

Guzman stated that there were words that she did not understand, she did not know how to explain the answers she wished to express, that she "did not know how to put it." Guzman testified she could write but could not spell some of the words in the answers she wanted to put down so she would just leave those questions blank.

Guzman further testified specifically as to the charge that would be given in this case that if it contained "big words" then she would not be able to read and understand the charge. When asked about the three special punishment questions she stated she could read and understand some of them but did not understand the rest. She could not pronounce nor did she know what the word "deliberate" meant or what was the import of that part of the second question regarding "continuing threat to society", although she could read at least the first part of the question. She further stated that she did not know what it meant to "do something deliberately" that she had never seen the word until she saw the charge. Veniremember Guzman further testified that although she could read the instructions, it might however take her as many as five readings before she would be able to answer one question. She stated she would probably still not understand the questions and therefore would have to have somebody explain their meaning to her. Before ruling upon the State's challenge for cause pursuant to Articles 35.16(a)(11), (b)(1), (3), the court asked Guzman the following question:

> "The Court: In talking about intentional, let me read this to you. A person acts intentionally or with intent with respect to the nature of his

> conduct or to a result of his conduct when it is his conscious desire to engage in the conduct of cause the result. Do you know what that means?
>
> "Veniremember Guzman: No, sir."

The court then sustained the State's challenge for cause on all grounds raised over appellant's objections.

The record more than adequately reflects that Guzman, having obtained only a fourth grade education, could not satisfy the statutory requirement of having the ability to read and write. It is clear that she did possess rudimentary grammatical skills, however, these in and of themselves, will not satisfy the statutory requirement. Hernandez v. State, 506 S.W.2d 884 (Tex.Cr.App. 1974). Given the fact that the trial court found Guzman's abilities to be in question, we find from the record sufficient evidence which supports the trial court's decision and therefore, the trial court did not abuse its discretion in sustaining the State's challenge for cause under Article 35.16(a)(11), V.A.C.C.P. Appellant's third point of error is overruled.

We, therefore, affirm appellant's conviction and sentence of death.

McCormick, Presiding Judge

(Delivered June 21, 1989)

En Banc

Publish

Clinton, J., finds the majority is creating a new unsupported rule for reviewing exercise of discretion and therefore joins only the judgment of the Court.

Teague, J., dissents.

Duncan, J., not participating.

DORSEY LEE JOHNSON, JR., Appellant

No. 69,750 vs. Appeal from SCURRY County

THE STATE OF TEXAS, Appellee

OPINION ON APPELLANT'S MOTION FOR REHEARING

Appeal was taken from a conviction for capital murder.[1] After finding appellant guilty, the jury returned affirmative findings to the statutory special issues.[2] Punishment was assessed by the trial court at death.

On original submission, this Court overruled appellant's points of error and affirmed his conviction.[3] In his motion for rehearing, appellant presented five grounds for rehearing. This Court granted only appellant's fifth ground, in which he complained the trial court erred when it failed to instruct the jury at punishment that they could consider appellant's age, or other factors, as a mitigating circumstance. Appellant cited *Penry v. Lynaugh*,[4] as support for this ground for rehearing.

At trial during punishment, appellant requested an additional instruction on consideration of mitigating evidence. The trial court agreed, and gave this instruction to the jury:

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[1] TEX. PENAL CODE § 19.03(a)(2).

[2] TEX.CODE CRIM.PROC. ANN. art. 37.071.

[3] Johnson v. State, 773 S.W.2d 322 (Tex.Cr.App. 1989).

[4] Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

> "In determining each of these Issues, you may take into consideration all the evidence submitted to you in the trial of this case, whether aggravating or mitigating in nature, that is, all the evidence in the first part of the trial when you were called upon to determine the guilt or innocence of the Defendant and all the evidence, if any, in the second part of the trial wherein you are called upon to determine the answers to the Special Issues."

The trial court did not specifically apply this instruction to the factor of appellant's youthful age, nor did appellant request the trial court to do so. In addition, this instruction did not present consideration of mitigating evidence as a third special issue upon which the jury could choose to sentence appellant to life imprisonment.[5] It is in this motion for rehearing that appellant has raised for the first time the failure of the trial court to instruct the jury that it could consider appellant's age in mitigation of his punishment.

We will overrule this ground for rehearing for two reasons.

The only mitigating evidence mentioned by appellant in this motion for rehearing is his age at the time of the commission of the instant offense. Appellant does not even state what his age was at the time of the commission of the instant offense. From the decision of this Court on original submission, wherein we described the voir dire of venire person Kiker, we could assume that appellant's

---

[5] See TEX.CODE CRIM.PROC.ANN. art. 37.071, Sec. 2(e) & (f) (Vernon's 1991).

age was nineteen when the instant offense was committed.[6]

Because age is the only mitigating factor mentioned by appellant, we will review the instant case from the perspective of determining if the trial court's instructions at punishment permitted the jury to consider and give mitigating effect to appellant's youthful age when he committed the instant offense.[7]

In *Lackey v. State*,[8] this Court held that the defendant's youth was relevant to a proper resolution of the concerns of special issue two.[9] If a juror believed that appellant's violent actions were a result of his youth, that same juror would naturally believe that appellant would cease to behave violently as he grew older. Such a juror would be able, under special issue number two, to express a reasoned moral response to applicant's youth. We find in the instant case, that the art. 37.071 instructions did not restrict the instant jury from considering and giving mitigating effect to the evidence of appellant's age.[10]

We conclude that the trial court did not err when it did not specifically instruct the jury to consider and give effect to appellant's age at trial, since the jury was able to

---

[6] See *Johnson v. State*, 773 S.W.2d, at 331.

[7] *Penry v. Lynaugh*, 109 S.Ct. 2934; *Black v. State*, 816 S.W.2d 350 (Tex.Cr.App.1991).

[8] Lackey v. State, 819 S.W.2d 111, at 134 (Tex.Cr.App.1991).

[9] See TEX.CODE CRIM.PROC.ANN. art. 37.071(b)(2).

[10] *Lackey v. State, supra*. See also Graham v. Collins, 950 F.2d 1009 (1992).

express a reasoned moral response to appellant's mitigating evidence within the scope of the art. 37.071 instructions given to them by the trial court. We hold article 37.071 was not unconstitutionally applied to appellant. Appellant's fifth ground for rehearing is overruled.

Appellant's motion for rehearing is denied.

PER CURIAM

(Delivered May 27, 1992)

En Banc

Do Not Publish

Clinton, J., dissents.

SUPREME COURT OF THE UNITED STATES

No. 92-5653

Dorsie Johnson,

Petitioner

v.

Texas

ON PETITION FOR WRIT OF CERTIORARI to the Court of Criminal Appeals of Texas.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, March 22, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 12, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m. Thursday, April 22, 1993. The case is set for oral argument on Monday, April 26, 1993. Rule 29 does not apply in this case.

Feburary [sic] 19, 1993

Supreme Court, U.S.
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MAR 22 1993
OFFICE OF THE CLERK

No. 92-5653 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DORSIE LEE JOHNSON,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Texas Court of Criminal Appeals

BRIEF FOR PETITIONER

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49pp

QUESTION PRESENTED

Did the Texas capital sentencing statute unconstitutionally preclude the jury from giving full mitigating effect to the petitioner's youthful age at the time of the offense?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
CITATION TO OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	2
STATEMENT OF THE CASE	3
A. Course of Prior Proceedings	3
B. Statement of Facts	3
SUMMARY OF ARGUMENT	10
ARGUMENT	12
A. This Court's Decisions Confirm That the Eighth Amendment's Requirement of Individualized Sentencing is Primarily Designed to Permit Sentencer Consideration of a Capital Defendant's Reduced Moral Culpability	12
B. States May Structure Sentencer Consideration of Mitigating Evidence to Ensure that a Sentencing Determination Truly Represents a "Reasoned Moral Response" to an Offender and his Offense	18
C. Mr. Johnson's Youth Could Not Be Adequately Considered Within the Former Texas Special Issue Scheme Because the Special Issues Do Not Permit Sentencer Consideration of Youth as it Bears on the Defendant's Moral Culpability	21
1. In accordance with this Court's decisions, as well as the Nation's traditions and human experience, youth is powerfully mitigating because a youthful defendant may fairly be regarded as less culpable than an older and more experienced one	21

2. The first special issue's narrow focus on the "deliberateness" of Mr. Johnson's actions at the time of the offense did not permit his jury to consider his youth as lessening his moral culpability	26
3. The second special issue, by focusing on Mr. Johnson's likely behavior in the future, offered no vehicle through which the jury could consider Mr. Johnson's culpability for the offense already committted	32
CONCLUSION	39

TABLE OF AUTHORITIES

CASES	Page
Bell v. Ohio, 438 U.S. 637 (1978)	36
Blystone v. Pennsylvania, 494 U.S. 299 (1990)	19
Boyd v. State, 811 S.W.2d 105 (Tex. Crim. App. 1991)	29
Boyde v. California, 494 U.S. 370 (1990)	18
Brown v. Francis, 326 S.E.2d 735 (Ga. 1985), *cert. denied*, 474 U.S. 865 (1985)	23
Bullington v. Missouri, 451 U.S. 430 (1981)	14
Burns v. State, 761 S.W.2d 353 (Tex. Crim. App. 1988)	37
Buxton v. State, 699 S.W.2d 212 (Tex. Crim. App. 1985)	30
California v. Brown, 479 U.S. 538 (1987)	*passim*
Coker v. Georgia, 433 U.S. 584 (1977)	35
Duffy v. State, 567 S.W.2d 197 (Tex. Crim. App. 1978)	30
Earhart v. State, 823 S.W.2d 607 (Tex. Crim. App. 1991) cert. pending, No. 91-8105	30
Eddings v. Oklahoma, 455 U.S. 104 (1982)	*passim*
Enmund v. Florida, 458 U.S. 782	32
Farris v. State, 819 S.W.2d 490 (Tex. Crim. App. 1991)	30,38
Finney v. State, 320 S.E.2d 147 (Ga. 1984), *cert. denied*, 470 U.S. 1088 (1985)	23
Franklin v. Lynaugh, 487 U.S. 164 (1988)	16
Goodman v. State, 701 S.W.2d 850 (Tex. Crim. App. 1985)	30
Graham v. Collins, ___ U.S. ___, 113 S.Ct. 892 (1993)	*passim*
Green v. State, 840 S.W.2d 394 (Tex. Crim. App. 1992)	29

Table of Authorities Continued

	Page
Gregg v. Georgia, 428 U.S. 153 (1976)	22,34
Havard v. State, 800 S.W.2d 195 (Tex. Crim. App. 1989)	28,30
High v. Kemp, 819 F.2d 988 (11th Cir. 1987)	23
Hill v. Lockhart, 927 F.2d 340 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 344 (1991)	23
Hitchcock v. Dugger, 481 U.S. 393 (1987)	14
Ice v. Commonwealth, 667 S.W.2d 671 (Ky. 1984), *cert. denied*, 469 U.S. 860 (1984)	23
James v. State, 772 S.W.2d 84 (Tex. Crim. App. 1989)	37
Johnson v. State, 773 S.W.2d 322 (Tex. Crim. App. 1989)	1,3
Johnson v. Texas, ___ U.S. ___, 61 U.S.L.W. 3575 (Feb. 19, 1993)	3
Jurek v. Texas, 428 U.S. 262 (1976)	17
Kinnamon v. State, 791 S.W.2d 84 (Tex. Crim. App. 1990)	28
Knox v. State, 744 S.W.2d 53 (Tex. Crim. App. 1987)	29
Kunkle v. State, 771 S.W.2d 435 (Tex. Crim. App. 1986)	38
Lewis v. State, 815 S.W.2d 560 (Tex. Crim. App. 1991)	29
Lockett v. Ohio, 438 U.S. 586 (1978)	*passim*
Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987)	23
McCleskey v. Kemp, 481 U.S. 279 (1987)	15
McKoy v. North Carolina, 494 U.S. 433 (1990)	30
Moore v. Balkcom, 716 F.2d 1511 (11th Cir. 1983), *cert. denied*, 465 U.S. 1084 (1984)	23
Motley v. State, 773 S.W.2d 283 (Tex. Crim. App. 1989)	37

Table of Authorities Continued

	Page
Narvaiz v. State, 840 S.W.2d 415 (Tex. Crim. App. 1992)	29
Penry v. Lynaugh, 492 U.S. 302 (1989)	*passim*
Penry v. State, 691 S.W.2d 636 (Tex. Crim. App. 1985)	30
People v. Frank, 798 P.2d 1215 (Cal. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2816 (1991)	23
Proffitt v. Florida, 428 U.S. 242 (1976)	14,31
Rector v. State, 738 S.W.2d 235 (Tex. Crim. App. 1986)	30
Rivera v. State, 725 S.W.2d 311 (Tex. Crim. App. 1986)	30
Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977)	22
Saffle v. Parks, 494 U.S. 484 (1990)	18
Skipper v. South Carolina, 476 U.S. 1 (1986)	34
Stanford v. Kentucky, 492 U.S. 361 (1989)	22,23
State v. Barber, 753 S.W.2d 659 (Tenn. 1988), *cert. denied*, 488 U.S. 900 (1988)	23
State v. Searcy, 798 P.2d 914 (Idaho 1990)	23
State v. Valencia, 645 P.2d 239 (Ariz. 1982)	23
Stewart v. State, 686 S.W.2d 118 (Tex. Crim. App. 1984)	37
Sumner v. Shuman, 483 U.S. 66 (1987)	16,21
Tison v. Arizona, 481 U.S. 137 (1987)	14
Trevino v. State, 815 S.W.2d 592 (Tex. Crim. App. 1991)	28
Truesdale v. Aiken, 480 U.S. 527 (1987)	34
Walton v. Arizona, 497 U.S. 639 (1991)	20
Webb v. Texas, 760 S.W.2d 263 (Tex. Crim. App. 1988)	30

Table of Authorities Continued

	Page
Westley v. State, 754 S.W.2d 224 (Tex. Crim. App. 1988)	30
Williams v. State, 773 S.W.2d 525 (Tex. Crim App. 1988)	30
CONSTITUTIONAL PROVISIONS	
U.S. Const. Amend. VIII	*passim*
U.S. Const. Amend. XIV	1
STATUTES	
28 U.S.C. § 1257 (3)	1
Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848 (O) (1) (1988)	19
Fla. Stat. Ann. § 921.141(5) (Supp. 1976-1977)	31
Okla. Stat., Tit. 21, § 701.12 (7) (1980)	35
Okla. Stat., Tit. 21, § 701.10 (7) (1980)	35
Tex. Code Crim. Proc. Art. 37.071 (Vernon's ed. 1989)	*passim*
Tex. Pen. Code § 19.03 (a) (2) (West ed. 1992)	26
Va. Code Ann. § 19.2-264.4C (Michie 1992)	35
RULES OF COURT	
Sup. Ct. Rule 24.1(a)	26
MISCELLANEOUS	
Aichhorn, *Wayward Youth* (introduction by Sigmund Freud) (Viking ed. 1963)	23
Encyclopedia of Crime and Criminal Justice (Kadish ed.) (1983)	27
Erikson, *Childhood and Society* (1963)	23
Kastenbaum, Time and Death in Adolescence, in Feifel, ed., *The Meaning of Death* (1959)	24
Radzinowicz, *A History of English Criminal Law and Its Administration* (1948)	39
Streib, *Death Penalty for Juveniles* (1987)	24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-5653

DORSIE LEE JOHNSON,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Texas Court of Criminal Appeals

BRIEF FOR PETITIONER

CITATION TO OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals on original submission is reported at 773 S.W.2d 322 (Tex. Crim. App. 1989). The opinion of that Court on rehearing is unreported; it appears at JA 178.

JURISDICTION

The Texas Court of Criminal Appeals denied rehearing in Mr. Johnson's case on May 27, 1992. His petition for certiorari was timely filed. This Court has jurisdiction under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Eighth Amendment to the United States Constitution reads in pertinent part:

> [N]or [shall] cruel and unusual punishments [be] inflicted.

The Fourteenth Amendment to the United States Constitution, reads in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law
> . . . .

The former Texas capital sentencing statute, Tex. Code Crim. Proc. Art. 37.071 (Vernon's ed. 1989), provided

> (b) On conclusion of the presentation of the evidence, [at the sentencing phase of a capital murder trial] the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
>
> . . . .
>
> (e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death
>
> . . . .

STATEMENT OF THE CASE

A. Course of Prior Proceedings

A Snyder, Texas jury convicted Mr. Johnson of capital murder on November 12, 1986. JA 151. The jury returned affirmative answers to the special issue questions of the former capital sentencing statute, and the judge sentenced Mr. Johnson to death as required by law. JA 152-153; *see* former Tex. Code Crim. Proc. art. 37.071 (Vernon's ed. 1989).

The Texas Court of Criminal Appeals affirmed Mr. Johnson's conviction and sentence. *Johnson v. State*, 773 S.W.2d 322 (Tex. Crim. App. 1989). Mr. Johnson sought rehearing, challenging his death sentence under this Court's then-recent opinion in *Penry v. Lynaugh*, 492 U.S. 302 (1989). The Texas Court denied rehearing. JA 181.

This Court granted review. *Johnson v. Texas*, __, U.S. __, 61 U.S.L.W. 3575 (Feb. 19, 1993).

B. Statement of facts

Nineteen-year-old Dorsie Lee Johnson, Jr., spent the evening of March 22, 1986, drinking beer at Butler's Cafe in Colorado City, Texas. S.F. Vol. XIII at 487. During the five hours or so he spent at Butler's, Dorsie drank twelve beers. *Id.* At approximately 1:30 a.m., Dorsie was invited to go joyriding with Janet Miles and her sister Amanda; he accepted. *Id.* at 488. Janet drove to her boyfriend's house in nearby Snyder, told Amanda she would be staying there, and left the car. *Id.* As they drove away, Amanda pulled a pistol from beneath the driver's seat, and asked Dorsie to join her in robbing the Allsup's convenience store a few blocks away. *Id.* Dorsie reluctantly replied that he "didn't know," and "hadn't never done anything like that."

Id. The pair then "drove around town for a while," discussing Amanda's proposal. *Id.* at 488, 490. When Amanda asked whether Dorsie were willing to eliminate any witnesses, he hesitated: "I ain't never did nothing like this." *Id.* After driving around a bit longer, and smoking "marijuana laced with some kind of dope," the pair eventually entered the store. *See* S.F. Vol. XIII at 431.

After he and Amanda went into Allsup's, Dorsie asked to buy a gallon of orange juice. S.F. Vol. XIII at 491-492. The clerk, Jack Huddleston, walked into the cooler to see whether he had any large containers on hand, and Dorsie followed. *Id.* Dorsie then pulled Amanda's gun from his pocket and ordered the clerk to lie on the floor. *Id.* at 492. After he did so, Dorsie shot him once, killing him instantly. *Id.*; *see also id.* at 371-372. When Dorsie emerged from the cooler, Amanda had already emptied the cash register. *Id.* at 492. Amanda drove them back to Colorado City, where she counted out the proceeds and gave Dorsie half. *Id.* at 493.

Dorsie Johnson was arrested about two weeks later in connection with an unrelated offense. He was tried seven months later, in November, 1986. During jury selection, the prosecutor employed hypothetical questions that encouraged jurors to blur the already indistinct line between "intentional" and "deliberate" conduct.[1] He also suggested

[1] *See, e.g.*, S.F. Vol. XII at 4847 (prosecutor has "no problem" with juror Gilbert Garcia's definition: "[D]eliberately [is] when he killed a person, when he didn't have to, [and] intentionally to me that he went in there with the intention to do it"), 4850 (Prosecutor to juror Garcia: "If [I] see somebody standing at that door and I go [ahead] and shoot them, now, then, I am deliberately causing their death. I am deliberately doing something that would deliberately cause their death and with a reasonable expectation that death would result. In other words, if I shoot a gun at somebody, I have got to have a reasonable expectation that they could die from that"); S.F. Vol. X at 4208 (Prosecutor to juror Treva Quinney: "The law says it really doesn't matter whether or not the Defendant has been planning to commit this robbery and

to several jurors that "threatening to punch someone in the nose" or even "breaking windows" would support an affirmative answer to the second special issue.[2]

After the jury returned a verdict of guilt, the State presented its case for the death penalty. The State's first several witnesses described Dorsie's childhood. Rocky Salazar, who had known Mr. Johnson "most all [his] life," recounted how, at age twelve, Dorsie had cut him with a piece of glass one afternoon before junior varsity football practice.[3] S.F. Vol. XV at 6-7. Another classmate described a similar incident from the following year. *Id.* at 15-17. The State also introduced Mr. Johnson's complete middle school records. JA 108-124. The records described, *inter alia*, Dorsie's giving a teacher "the finger" in class, cutting in line in the cafeteria, and giggling uncontrollably at a classmate's joke. JA 113, 121-123.

kill the clerk for two weeks or two hours or two minutes or two blinks of an eye. If he did it, if he did commit the robbery and did commit the murder intentionally and deliberately, then how much forethought and planning went into it really doesn't matter. The man is still dead"); S.F. Vol. IX at 3509-3510 (juror Tracy Lammert: "[W]e never would have reached guilty if [special issue] number one probably wasn't answered." *Id.*: "I'm sure [that] they'll prove to me that the man deliberately killed this man. . . . I mean, you don't just accidentally kill people"); *see also* S.F. Vol. XI at 4598-99 (juror Carolyn Hamby) (hypothetical failing meaningfully to distinguish "deliberate" from "intentional"); S.F. Vol. IX at 3708 (juror Freda Rayvon) (same); S.F. Vol. IX at 3509-3510 (juror Tracy Lammert) (same).

[2] *See, e.g.*, S.F. Vol. XI at 4602 (Prosecutor to juror Carolyn Hamby: "[Criminal acts of violence] might include criminal mischef [sic]. Somebody going around and breaking out all the windows in school. That is a violent—that is an act of violence"); S.F. Vol. IX at 3710 (Prosecutor to juror Freda Rayvon: threatening to punch in nose, without actually striking, is criminal act of violence).

[3] Defense counsel objected to the introduction of evidence of this unadjudicated juvenile offense, and renewed his objection as the State presented other, similar evidence. *See, e.g.*, S.F. Vol. XV at 7-8. The trial court, consistent with Texas authority, denied the objections. *See* text *infra*.

The prosecution's witnesses also recalled other events involving Dorsie as a teenager. Douglas Smith accused Dorsie of "assisting" him in burglarizing a sporting goods store at fifteen; Smith was eighteen at the time. S.F. Vol. XV at 74-75. Paula Williams, a lifelong acquaintance of Mr. Johnson's, described how sixteen-year-old Dorsie ran around with friends who drank and used drugs, despite her attempts to keep him away from them. *Id.* at 135-138. Probation officer John Bahlmann recalled how, as a probationer in the spring of 1985 two years later, Mr.Johnson had proven unable to stop using marijuana. S.F. Vol. XV at 109, 111.[4]

The prosecution's witnesses also described Mr. Johnson's downward spiral in the spring of 1986. Paula Williams confirmed that nineteen-year-old Dorsie was constantly "smoking dope" and drinking; his worsening drug habit by that time included cocaine. S.F. Vol. XV at 140. She recounted how Dorsie, heavily intoxicated, had brandished an axe threateningly in the yard as she watched from indoors. *Id.* at 141-142. Beverly Johnson, a family friend, testified to Dorsie's escalating drug use; she and other witnesses described several incidents around the time of the Allsup's robbery in which his intoxication was accompanied by moodiness, impulsivity, and threats of violence. *Id.* at 160-164, 177-178; *see also id.* at 218, 245.

Finally, the prosecution presented several witnesses who detailed Dorsie Johnson's involvement in an aggravated robbery about two weeks after the Huddleston murder. In that offense, Dorsie had accompanied Amanda's brother George Miles to rob Tom Burrus' store in Colorado City.

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[4] Mr. Johnson was on probation for a second burglary. S.F. Vol. XV at 96. At closing argument, the prosecutor emphasized that these non-violent burglaries (both of businesses) supported an affirmative answer to the "continuing threat" inquiry of the second special issue, *see infra*, despite the issue's apparent focus on "criminal acts *of violence*." JA 54.

S.F. Vol. XV at 333. During the holdup, Dorsie shot Mr. Burrus in the face and George Miles stabbed Mr. Burrus in the back. *Id.* These wounds were not fatal. *Id.*

The defense presented the testimony of Dorsie's father, Dorsie Lee Johnson, Sr. JA 10-48. He recalled taking Dorsie Jr., his youngest child, to church, and Dorsie's involvement in the youth department and choir. JA 23, 14. He told of Dorsie's childhood bouts with bronchitis, which sometimes kept him hospitalized for days at a time, under an oxygen tent. JA 16. Partly as a result of his periodic illness, but also as a result of a "devilish" temperament, Dorsie periodically missed school. JA 15-16.

Mr. Johnson, Sr., also testified that he had separated from Dorsie's mother in 1980, and that she had moved to Waco. JA 14-15. Four years later, Dorsie's mother was incapacitated by a stroke, and died soon after. JA 15, 20. Mr. Johnson, Sr., first learned of his son's involvement with drugs when he visited Dorsie and his sister in Waco after their mother's death. *Id.* Dorsie's sister had been "getting on him" about the risks of his drug use, but was herself murdered in 1985. *Id.* These tragedies "sort of set [Dorsie] off;" he turned more frequently to drugs, trying to "find some relief." *Id.* He had been "wrapped up in his mother [and] his older sister;" their death left him "just devastated." JA 20, 23.

Asked what could have led his son to do the "horrible things" of which he had been convicted, Mr. Johnson, Sr., drew this conclusion:

> The only answer is the answer I get from everywhere else from every angle of life, every part of life that I know about is foreign substances, drugs. . . . [F]rom all of the books I've read and studied about it, it makes you worse. It alters you. They alter your thinking. They alter your habits. They alter your control. And once you're deprived of it . . . [you] can be rehabilitated. Then

> if you get—if you let it alone, you can [be] a different person. . . . [T]hat's my son and I love him. And I'd plead before President Reagan and anybody else for a chance for him. And I say lock him up, get him away from the environment and these habits and he could be a different person.

JA 25, 26. He also rued the company his youngest son had kept since age seventeen: youths with the "[s]ame problem: [d]rugs, drinking." JA 26. Asked whether Dorsie had gotten away from "those folks," his father answered plaintively, "Lord oh mercy, I wish he had." JA 27. In light of all he knew about his son, he confirmed that Dorsie was not "a real mature person" at nineteen:

> A: No, no. Age of nineteen? No, sir. That, also, I find to be a foolish age. That's a foolish age. They tend to want to be macho, built-up, trying to step into manhood. You're not mature-lized for it.

Id.

Finally, he described how Dorsie, Jr., had cried over his role in the offense, and the apparent ruin of his life: "Daddy, I wish I could change it. I wish it never had happened. I wish I had listened more closely to what you said and the way I was raised. I just got off, got into that stuff. It got the best of me." JA 30. As he summed up his plea for his teenage son:

> [A]ll I can say is I still think that a kid eighteen or nineteen years old has an undeveloped mind, undeveloped sense of assembling not—I don't say what is right or wrong, but the evaluation of it, how much, you know, that might be—well, he just don't—he just don't evaluate what is worth—what's worth and what's isn't like he should like a thirty or thirty-five year old man would. He would take under consideration a lot of things that a younger person that age wouldn't.

JA 47.

At closing argument, defense counsel asked "not . . . for leniency," but for "the appropriate punishment under the evidence." JA 62. He attempted to broaden the jury's inquiry into "deliberateness," despite the fact that the trial court had refused to given them a broadening definition:

> Did he have full realization as to what he was doing? So the mitigating circumstances to that might be his age. I don't know that that is all of the mitigation in the case if he should have at the age of nineteen full realization. . . . Now, he is—you look at him. He is a person. He is a human being. That is something you should remember. He is not just a Defendant. He is a human being.

JA 63, 70. He urged the jury to conclude that "there is a possibility that [Dorsie] can change." JA 81.

The prosecutor, however, insisted that the jury find that nineteen-year-old Dorsie Johnson, Jr., posed a "continuing threat" as he stood before them, and in the immediate future:

> I will agree that it is possible that he may change. . . . Would you agree that we cannot predict twenty or forty years down the road what somebody is going to be like? I will agree. . . . How many more Jack Huddlestons, how many more Don Burrus do we have to put in the grave before concluding we can't wait for Dorsie Johnson to change again twenty or forty years from now? . . . I don't want us to have the same regret while we wait twenty or forty years and count the [victims]. . . .

JA 91, 107.

Defense counsel had objected to the court's charge at punishment, requesting special instructions to broaden the inquiry of the narrow "special issues." *See* S.F. Vol. XV at 399-409. The Court refused to permit an additional instruction that would have permitted the jury to consider mitigating evidence *outside* the framework of the special issues. Instead, the trial judge merely modified the statutory instructions to direct the jury to consider mitigating evidence "in determining each of these [special] issues." *Id.* at 404; *see* text *infra*.

The jury returned affirmative answers to the special issues and the court sentenced Mr. Johnson to death as required by statute. JA 152-153.[5]

SUMMARY OF ARGUMENT

The Eighth Amendment entitles capital defendants to an individualized determination of sentence. As the Court's recent decisions make clear, the essential goal of individualization is to assure that the sentence imposed reflects a "reasoned moral response" to both the offender and his crime. In rejecting mandatory capital sentencing provisions, this Court has emphasized that the most extreme punishment must be reserved for the most culpable offenders. Accordingly, capital defendants must be permitted to present, and sentencers must be allowed to consider, evidence that reflects the defendant's reduced culpability.

At the same time, States may structure and regulate the sentencer's consideration of mitigating evidence in order to promote the equitable and rational administration of the death penalty and to assure reliability in the imposition of the ultimate sanction. In structuring the consideration of mitigating evidence, however, a State may not define the relevant factual inquiries so narrowly that

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[5] *See* (former) Tex. Code Crim. Proc. Art. 37.071 (e) (Vernon's ed. 1989).

the sentencer is precluded from considering evidence bearing on the defendant's culpability; the sentencer must remain free to assess the moral guilt of the defendant in order to make the sentence fit both the crime and the criminal.

The Texas jury that sentenced nineteen-year-old Dorsie Lee Johnson for his role in a robbery-murder was asked two factual questions: whether he had killed "deliberately," and whether he would pose a "continuing threat" of violence to the community. The jury answered both questions "yes," and, solely on the basis of those answers, the trial court sentenced Mr. Johnson to death as required by state law.

This Court's decisions, as well as our traditions and experience, confirm that a defendant's youth at the time of the crime is a powerful mitigating factor relevant to the sentencer's choice between life and death. This Court's frequent reference to youth in its Eighth Amendment decisions reflects the widespread societal understanding that a defendant's youth bears uniquely on his moral culpability.

The Texas special issue scheme, however, did not permit Mr. Johnson's jury to consider his youth as reducing his moral culpability. Under Texas law, the first special issue focused solely on the brief moments during which the crime unfolded rather than on the youthful immaturity and impulsivity that colored Mr. Johnson's judgment at the time. Accordingly, the jury could well have concluded that Mr. Johnson acted "deliberately"—necessitating a "yes" answer to the special issue—without concluding that the death penalty was an appropriate punishment for a person of Mr. Johnson's limited experience and unformed character.

The second special issue, on the other hand, required the jury to predict a future fact—the likelihood that Mr. Johnson would commit further violent acts. Mr. Johnson's youth could have been minimally relevant to this determination if the jury concluded that his youth made him a

strong candidate for rehabilitation. But this question, like the first special issue, did not permit the jury to consider whether Mr. Johnson's youth reduced his culpability for the crime already committed, thus warranting a less severe punishment. Moreover, while Mr. Johnson's jury was prevented from considering the most powerful mitigating aspects of his youth, it might easily have given his youth aggravating weight. Mr. Johnson's youth would not dissipate immediately, and the jury might well have regarded him as a continuing threat to society in the interim.

Accordingly, Mr. Johnson's jury was unable to express a reasoned moral response to his youth as it answered the special issues that dictated his fate. The Eighth Amendment thus requires that Mr. Johnson be resentenced by a properly instructed jury.

ARGUMENT

A. THIS COURT'S DECISIONS CONFIRM THAT THE EIGHTH AMENDMENT REQUIREMENT OF INDIVIDUALIZED SENTENCING IS PRIMARILY DESIGNED TO PERMIT SENTENCER CONSIDERATION OF A CAPITAL DEFENDANT'S REDUCED MORAL CULPABILITY.

This Court's recent Eighth Amendment jurisprudence reveals the systematic exposition of a central unifying idea: that a capital sentencing jury's decision must reflect a "reasoned moral response" to the offender and his offense. To ensure such a response, this Court has required that the jury have discretion to consider the defendant's mitigating evidence as it bears on his personal culpability. That sentencer consideration of reduced culpability has been the touchstone of this Court's individualization requirement is reflected in a number of decisions culminating in *Penry v. Lynaugh*, 492 U.S. 302 (1989).

In *California v. Brown*, 479 U.S. 538 (1987), for example, the Court considered whether the rule of *Lockett*

v. Ohio, 438 U.S. 586 (1978) (plurality opinion) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), was infringed by an instruction that jurors not consider "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling" during their penalty phase deliberations. *Brown*, 479 U.S. at 539. In *Lockett* and *Eddings*, the Court held that a capital sentencer must be free to consider, as a mitigating factor, any evidence about the character and record of the defendant, or the circumstances of the offense, proffered as a basis for a sentence less than death. *Lockett*, 438 U.S. at 607; *Eddings*, 455 U.S. at 113-114. The question, then, was whether this cautionary instruction denied the defendant's right to have the jury consider his mitigating evidence. The Court held that a reasonable interpretation of the charge as a whole would not have precluded the jurors from properly evaluating the defendant's evidence. *Brown*, 479 U.S. at 541-542.

Justice O'Connor, however, wrote separately, and addressed what she perceived as the larger issue in the case—namely, the scope of the defendant's substantive entitlement to the consideration of his mitigating evidence, and how the challenged instruction might affect that right. *Id.* at 545-546. Recognizing that Anglo-American jurisprudence had long focused on "culpability" in sentencing decisions, as the common law struggled to develop a capital punishment system that is "sensible to the uniqueness of the individual," Justice O'Connor maintained that "*Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* (Citation omitted).

Accordingly, she concluded, "the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence." *Id.* Such an inquiry should result in a sentence that reflects "a

reasoned *moral* response to the defendant's background, character, and crime." *Id.* (Emphasis in original).[6]

Two other decisions from the same Term, although they did not speak explicitly of the jury's sentencing decision as a"reasoned moral response," plainly embraced the same emphasis on the defendant's personal culpability as the focus of capital sentencing. First, this Court reconsidered the statute it had facially approved in *Proffitt v. Florida*, 428 U.S. 242 (1976), and determined that *Proffitt*'s scheme *in practice* could deny the jury full authority to consider and give effect to mitigating evidence. *Hitchcock v. Dugger*, 481 U.S. 393 (1987). Hitchcock had introduced mitigating evidence

> that as a child [he] had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that [he] had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that [he] had been a fond and affectionate uncle to the children of one of his brothers.

Hitchcock, 481 U.S. at 397. This Court observed that the Florida statute under which Hitchcock was sentenced con-

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[6] Justice O'Connor's focus on the "moral" character of the sentencing inquiry was not new; her carefully crafted phrase in *Brown* ("reasoned moral response"), like her discussion of *mens rea* in *Tison v. Arizona*, 481 U.S. 137 (1987), reflected her view that the jury's choice between life and death must involve a rational judgment about appropriate *retribution* for a particular crime. *See Graham v. Collins*, ___ U.S. ___, 113 S.Ct. 892, 924 n.9 (1993) (Souter, J., dissenting) ("reasoned moral response" is "appropriate shorthand" for the individual assessment of culpability required by *Lockett* and *Eddings*); *see also Tison*, 481 U.S. at 149 (discussing relationship between *mens rea* and retribution rationale); *Bullington v. Missouri*, 451 U.S. 430, 450 (1981) (Powell, J., dissenting) ("The [capital] sentencer's function is not to discover a fact, but to mete out just deserts as he sees them").

fined consideration of "mitigating circumstances" to those enumerated in the statute. Because Hitchcock's mitigating evidence could not be fully considered within the enumerated mitigating circumstances, the Court unanimously concluded that such a proceeding deprived Hitchcock of his right to an individualized determination of sentence. Accordingly, resentencing was ordered. *Id.* at 399.[7]

The Court noted that Hitchcock's trial counsel had urged the jury to focus on the "overall picture" of his client, in addition to considering those facts that supported the enumerated mitigating circumstances of the former Florida statute. In particular, counsel urged the sentencing judge (after the jury's adverse recommendation) to consider Hitchcock's troubled background as he decided Hitchcock's punishment. Consideration of such background evidence is indisputably essential to a reasoned moral response. Thus, while the vocabulary of *Hitchcock*'s Eighth Amendment analysis was not yet Justice O'Connor's, its result very closely reflected the spirit of her *Brown* concurrence.[8]

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[7] Thus *Hitchcock*, like *Penry*, involved a reexamination—in light of *Lockett* and *Eddings*—of a statute previously found facially constitutional. Although in 1976 the statute approved in *Proffitt* had not "clearly operated . . . to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor," experience demonstrated that the statute as applied had precisely such an effect in cases where the defendant's mitigating evidence did not fit neatly or exclusively into the categories enumerated by the *Proffitt* scheme. *See Penry*, 492 U.S. at 317 (quoting *Lockett*, 438 U.S. at 607).

[8] The same day this Court issued *Hitchcock*, it announced its opinion in *McCleskey v. Kemp*, 481 U.S. 279 (1987). As it had in *Hitchcock*, the Court in *McCleskey* rejected the notion that "shoehorning" relevant mitigating evidence into ill-fitting categories could satisfy the Eighth Amendment's individualization requirement: "[i]f capital defendants are to be treated as 'uniquely individual human beings,' *then discretion to evaluate and weigh the circumstances relevant to the individual defendant and the crime he committed is essential.*" *Id.* at 313 n.37 (emphasis added; citation omitted).

Likewise, in *Sumner v. Shuman*, 483 U.S. 66 (1987), the Court held that even a very narrowly defined, highly aggravated category of murder—committed by a prisoner already serving a sentence of life without parole—could not justify an automatic sentence of death upon conviction. *Id.* at 81-82. As the Court reasoned,

> These two elements of capital murder[9] do not provide an adequate basis on which to determine whether the death sentence is the appropriate sanction in any particular case. . . . Past convictions of other criminal offenses can be considered as a valid aggravating factor in determining whether a defendant *deserves to be sentenced to death* for a later murder, but the inferences to be drawn concerning an inmate's character *and moral culpability* may vary depending on the nature of the past offense.

Id. at 78, 81 (emphases added). Here, for the first time, a majority of the Court identified the capital sentencing jury's task as "drawing inferences" about the defendant's "*moral* culpability," based on relevant mitigating evidence. *Shuman*'s implicit approval of the rationale of Justice O'Connor's concurrence in *Brown* suggested that the Court had finally embraced culpability as an essential focus of capital sentencing.

In *Franklin v. Lynaugh*, 487 U.S. 164 (1988), the Court held that a defendant's evidence of a clean prison disciplinary record could adequately be considered under the Texas special issues scheme. Justice O'Connor's critical concurrence emphasized that the Texas scheme fairly addressed the defendant's evidence because its full meaning

[9] The two elements were "that [the defendant] had been convicted of murder while in prison, [and] that he had been convicted of an earlier criminal offense which, at the time committed, yielded a sentence of life imprisonment without possibility of parole." *Shuman*, 483 U.S. at 78.

could be considered within the second special issue; evidence of a good prison record is *only* important in that it suggests that a defendant is less likely to be dangerous in the future. At the same time, Justice O'Connor maintained that the "principle underlying *Lockett*, *Eddings*, and *Hitchcock*, is that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 184. Accordingly, if a defendant presented mitigating evidence regarding reduced culpability "that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence. *Id.* at 185.

Franklin confirmed that *Jurek v. Texas*, 428 U.S. 262 (1976), remained good law: the former Texas special issue scheme did not *invariably* preclude sentencer consideration of mitigating evidence. But *Franklin* also suggested that in some cases the former scheme would not permit adequate consideration of a defendant's personal moral culpability, and, in such circumstances, that the Eighth Amendment's guarantee of individualized sentencing would require an additional instruction.

A majority of this Court adopted Justice O'Connor's position in *Penry v. Lynaugh*, 492 U.S. 302 (1989). In *Penry*, the defendant sought juror consideration of his mental retardation at the punishment stage of his capital trial. Penry's mental retardation, and the resulting limitations on his ability to understand the meaning of his actions, undoubtedly reduced Penry's moral culpability for his crime. Yet the Texas special issues, by focusing on the factual issues of "deliberateness" and future dangerousness, did not permit Penry's jury to determine Penry's sentence in light of his reduced culpability. Accordingly, the failure of the Texas scheme to afford a "reasoned moral response" to Penry's evidence required reversal of Penry's sentence.

B. STATES MAY STRUCTURE SENTENCER CONSIDERATION OF MITIGATING EVIDENCE TO ENSURE THAT A SENTENCING DETERMINATION TRULY REPRESENTS A "REASONED MORAL RESPONSE" TO AN OFFENDER AND HIS OFFENSE.

The Court's decisions clarifying the underlying purpose of the individualization requirement have insisted that personal moral culpability should be the core concern of capital sentencing. At the same time, this Court has acknowledged in several decisions that States may "structure" the sentencer's inquiry into the appropriateness of a death sentence. Such structuring is permissible so long as it increases the reliability of capital proceedings and does not preclude sentencers from effecting their "reasoned moral response" in imposing sentence. The Court's decisions concerning State efforts to "shape" or "guide" the reception and consideration of mitigating evidence have carefully distinguished permissible procedural regulation from impermissible limitations on the consideration of mitigation evidence.

First, as a general matter, States are free to "structure and shape consideration of mitigating evidence," in order to achieve "a more rational and equitable administration of the death penalty." *Boyde v. California*, 494 U.S. 370, 377 (1990). States certainly retain a strong interest in assuring that the sentencer's decision is "reasoned" rather than purely emotional or arbitrary. This conclusion is apparent from the types of "structuring" and "shaping" devices this Court has approved; for example, the Court has endorsed instructions requiring the jury to "render its decision on the evidence without sympathy," *Saffle v. Parks*, 494 U.S. 484, 490 (1990) or to avoid the influence of, *inter alia*, "public opinion or public feeling." *Brown*, 479 U.S. at 539.[10] Nei-

[10] In light of those decisions, instructions mandating that the jury not consider the "race, color, religious beliefs, national origin, or sex" of the defendant in determining sentence would also appear to pass con-

ther practice circumscribes the jury's ability to assess the mitigating significance of the defendant's evidence in a given case. Nor does either rule preclude the jury's ultimate moral judgment that death is an excessively harsh sentence for a particular defendant, in light of his reduced culpability. Indeed, precisely because the sentencer's response should be *reasoned* and *moral*, States may prevent jurors from deciding capital cases on mere whim or sympathy. These cases, therefore, do not support State efforts to *deprive* jurors of an opportunity to gauge the moral culpability of a defendant.

Permissible State "structuring" of sentencer consideration of mitigating evidence also includes the assignment of presumptions and the distribution of burdens of proof. For example, this Court has authorized a presumption, once an aggravating factor has been proved, that death is the appropriate sentence unless the jury finds some mitigating factor sufficiently substantial to call for a lesser sentence. *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990); *see also Boyde*, 494 U.S. at 377 (same). Even under those schemes, however, the jury retains the ability to consider and to give effect to evidence of reduced culpability, and to make those determinations dispositive in imposing sentence. *See Blystone*, 494 U.S. at 305; *Boyde*, 494 U.S. at 381-384. If the jury concludes that *any* substantial aspect of the defendant's character or background reduces his culpability so as to make a death sentence unwarranted, it may enforce that "reasoned moral response" by returning a lesser sentence. In effect, the guidelines endorsed in *Blystone* and *Boyde* operate only in marginal cases, as a means of restraining juries from exercising capricious leniency in much the same manner as the antisympathy instruction approved in *Brown*.

stitutional muster. *See* Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848 (O) (1) (1988) (requiring capital sentencing jury to certify that no such influences affected its verdict).

This Court has also permitted States to require the defendant to bear the burden of proving mitigating circumstances, and to prove them by a preponderance of the evidence. *Walton v. Arizona*, 497 U.S. 639, 649-651 (1991). These rules may contribute to the overall reliability of a capital sentencing scheme by guaranteeing that the sentencer's "reasoned moral response" is based on sufficiently strong evidence. The "burden of proof" rule simply requires jurors to confirm that evidence of a particular mitigating circumstance is in fact substantial before they proceed to the essentially moral judgment of whether it lessens the defendant's culpability and thus makes death an inappropriate sentence.

Taken together, these cases confirm that States may devise capital sentencing procedures that reduce the possible influence of "whim or caprice," as long as those rules do not truncate "full and fair consideration of mitigating evidence." *Saffle*, 494 U.S. at 493. When a State exceeds this license, however—by precluding the jury from expressing its "reasoned moral response" to evidence of the defendant's reduced culpability—it has overstepped the constitutional bounds of permissible regulation. As the following discussion makes plain, the former Texas "special issues" operate in precisely this fashion when a defendant offers evidence of reduced culpability; rather than guiding the sentencer's discretion in a manner that promotes the rational administration of the death penalty, the Texas scheme precludes the jury from confronting the central moral question in capital sentencing—whether the defendant's reduced culpability justifies a sentence less than death. Far from ensuring that a jury's response is "rational," or based on substantial evidence, the Texas scheme risks intolerably arbitrary results, by exposing some defendants to a death sentence despite the fact that their culpability does not justify such a harsh sentence.

C. MR. JOHNSON'S YOUTH COULD NOT BE ADEQUATELY CONSIDERED WITHIN THE FORMER TEXAS SPECIAL ISSUE SCHEME BECAUSE THE SPECIAL ISSUES DO NOT PERMIT SENTENCER CONSIDERATION OF YOUTH AS IT BEARS ON THE DEFENDANT'S MORAL CULPABILITY.

1. In accordance with this Court's decisions, as well as the Nation's traditions and human experience, youth is powerfully mitigating precisely because a youthful defendant may fairly be regarded as less culpable than an older and more experienced one.

Before addressing why the former Texas special issues failed to afford the jury adequate discretion to consider Mr. Johnson's youth, it is appropriate to review briefly why youth has such extraordinary mitigating power to reduce a defendant's culpability in the eyes of a jury. A proper appreciation of the mitigating significance of youth reinforces the conclusion that the former Texas scheme as applied in his case denied Mr. Johnson an individualized sentencing determination.

If, as this Court's decisions teach, "the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant," then youth surely remains the archetypal mitigating factor that reasonably may justify a sentence less than death. *Brown*, 479 U.S. at 545 (O'Connor, J., concurring). At least three sources confirm this basic insight: this Court's own cases, the considered opinions of scientific experts, and the experience of jurors themselves.

First, this Court has always specifically acknowledged the mitigating power of a defendant's youth. When this Court has enumerated the factors that sentencers must consider in determining the defendant's fate, youth has assumed a primary place. *See, e.g., Sumner v. Shuman*, 483 U.S. 66, 81-82 (1987); *Lockett v. Ohio*, 438 U.S. 586,

608 (1978) (Ohio capital sentencing statute unconstitutional because, *inter alia*, "considerations of a defendant's comparatively minor role in the offense, or *age*, would generally not be permitted, *as such*, to affect the sentencing decision") (first emphasis added); *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 637 (1977); *Gregg v. Georgia*, 428 U.S. 153, 197 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.).

Moreover, when a majority of this Court adopted the rule of *Lockett*, *supra*, it specifically emphasized the critical importance of a defendant's youth and youthful infirmities in reducing his culpability:[11]

> Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence. *Eddings was a youth of sixteen years at the time of the murder.* . . . The trial judge recognized that *youth must be considered a relevant mitigating factor.* But youth is *more than a chronological fact.* It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. . . . [J]ust as *the chronological age of a minor is itself a relevant mitigating factor of great weight*, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.

[11] While this Court has held that defendants as young as sixteen are not *per se* exempt from the death penalty, it noted in so holding that "individualized consideration is a constitutional requirement [in capital cases, and] one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age." *Stanford v. Kentucky*, 492 U.S. 361, 375 (1989).

Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982) (all emphases added) (citations omitted).[12]

This unbroken line of authority is consistent with opinions expressed in the most influential scientific literature:

> Only under the pressure of painful adolescence does [the youth] gradually learn to impose restrictions upon his impulses and to accept the demands of society without conflict, and thus become social.

Aichhorn, *Wayward Youth* at 6 (introduction by Sigmund Freud) (Viking ed. 1963). Social science universally accepts that young people are less intellectually mature, more prone to faulty judgment, more susceptible to the influence of others, and less accustomed to making moral decisions than are their elders. Young people likewise may not easily learn from experience or mistakes; as Erik Erikson explained in his pathbreaking work, *Childhood and Society*:

> In their search for a new sense of continuity and sameness, adolescents have to refight many of the battles of earlier years, even though to do so they

[12] This Court's conclusions with respect to the powerful mitigating relevance of a capital defendant's youth have been echoed by numerous courts. *See, e.g., Hill v. Lockhart*, 927 F.2d 340, 343 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 344 (1991); *Magill v. Dugger*, 824 F.2d 879 (11th Cir. 1987); *High v. Kemp*, 819 F.2d 988, 993 (11th Cir. 1987); *Moore v. Balkcom*, 716 F.2d 1511, 1524 (11th Cir. 1983), *cert. denied*, 465 U.S. 1084 (1984); *People v. Frank*, 798 P.2d 1215 (Cal. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2816 (1991); *State v. Searcy*, 798 P.2d 914, 921 (Idaho 1990); *State v. Barber*, 753 S.W.2d 659, 669 (Tenn. 1988), *cert. denied*, 488 U.S. 900 (1988); *Brown v. Francis*, 326 S.E.2d 735 (Ga. 1985), *cert. denied*, 474 U.S. 865 (1985); *Finney v. State*, 320 S.E.2d 147 (Ga. 1984), *cert. denied*, 470 U.S. 1088 (1985); *Ice v. Commonwealth*, 667 S.W.2d 671, 680 (Ky. 1984), *cert. denied*, 469 U.S. 860 (1984); *State v. Valencia*, 645 P.2d 239, 241 (Ariz. 1982).

The traditional importance of youth as a mitigating factor is also reflected in the fact that twenty-nine state legislatures have specifically designated the defendant's age as a mitigating factor in capital cases. *See Stanford*, 492 U.S. at 375, 375 n. 5 (listing statutes).

> must artificially appoint perfectly well-meaning people to play the roles of adversaries. . . . Adolescence is the age of the final establishment of a dominant positive ego identity.

Id. at 261-263, 306. (1963).

Indeed, young people characteristically are so unable to weigh alternatives or evaluate the consequences of their conduct that they may unintentionally imperil themselves or others:

> The adolescent lives in an intense present: 'now' is so real to him that past and future seem pallid by comparison. Everything that is important and valuable in life lies either in the immediate life situation or in the rather close future.

Kastenbaum, Time and Death in Adolescence, in Feifel, ed., *The Meaning of Death* 99, 104 (1959). In sum, the difference that separates young people from adults is their "immature, undeveloped ability to reason in an adultlike manner." Streib, *Death Penalty for Juveniles* 3-20, 184-189 (1987).

Finally, youth undeniably possesses at least one *unique* quality as a mitigating factor: every juror has, at some point, herself been young. Most other familiar mitigating factors are outside jurors' actual experience; as a result, they can only appreciate the destructive consequences of circumstances such as desperate poverty, child abuse, mental illness, and mental retardation by analogy to their own life experience. Even if particular jurors might have suffered youth's infirmities to a greater or lesser degree, however, each has a *real*, *immediate* and *subjective* appreciation of the uncertainty, turmoil, and struggle that characterize that "time and condition of life." The dramatically increased mitigating power which youth may attain as a result should not be underestimated.

The sentencer in a capital case must be permitted to consider and give effect to both the mitigating qualities of "youthfulness" and the chronological fact of youth itself in assessing the defendant's culpability. As this Court noted in *Eddings*, even a normal teenager "customarily lacks the maturity of an adult," and the typical youthful defendant is hardly normal, frequently having been "deprived of the care, concern, and parental attention that children deserve." 455 U.S. at 116. These mitigating qualities, while not suggesting "an absence of responsibility for the crime of murder," nevertheless may call for a sentence less than death and so must be duly considered in sentencing. *Eddings*, 455 U.S. at 116. Thus, a teenage defendant's lack of maturity, impulsiveness, inability to weigh consequences, and poorly developed sense of responsibility, as well as the bare fact of his age alone, are directly relevant to his moral culpability, and to the jury's "reasoned moral response" concerning the appropriateness of the death penalty. It follows that a sentencing scheme which, as applied, precludes the sentencer from giving independent mitigating weight to a youthful defendant's reduced culpability violates the Eighth Amendment.[13]

The foregoing discussion demonstrates why youth, perhaps above all other potential mitigating factors, can elicit the reasoned moral response that a defendant's reduced culpability does not warrant the death sentence in a given case. However, as detailed *infra*, the jury that sentenced nineteen-year-old Dorsie Lee Johnson was unable to voice the conclusion that his youth justified a life sentence notwithstanding the answers to the narrow special issue questions.

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[13] Justice O'Connor noted that "of course, the relevant Oklahoma statute permits the defendant to *present* evidence of any mitigating circumstance." *Eddings*, 455 U.S. at 118 (O'Connor, J., concurring) (emphasis added). Because the sentencer could not *consider* and *give effect* to this evidence, however, the young defendant's death sentence violated the constitution. *Id.*

2. The first special issue's narrow focus on the "deliberateness" of Mr. Johnson's actions at the time of the offense did not permit his jury to consider his youth as lessening his moral culpability.

This Court's analysis in *Penry v. Lynaugh*, 492 U.S. 302 (1989), illustrates why the "deliberateness" question did not permit the jury adequately to consider Mr. Johnson's youth and other circumstances[14] in mitigation of punishment. At the sentencing phase of Mr. Johnson's capital trial, the jury has already found beyond a reasonable doubt that he had killed "intentionally."[15] Thus, to be confident that Mr. Johnson's mitigating evidence received its constitutional due under the first special issue, this Court must conclude that a reasonable juror would have distinguished "deliberate" from "intentional" conduct in a manner that would permit full consideration of relevant evidence bearing on Mr. Johnson's personal culpability. The *Penry* Court expressed skepticism about the reasonableness of such an assumption; given the similarity between these terms as commonly understood and the Texas

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[14] Because this Court granted review on the narrow question whether additional instructions were required to permit adequate consideration of Mr. Johnson's youth, Mr. Johnson does not suggest that this Court need separately assess the adequacy of the jury charge with respect to his other mitigating evidence, including heavy drug and alcohol use, emotional upheaval after his mother's death and his sister's murder, and remorse for the offense. However, this Court cannot gauge the constitutional adequacy of the "special issues" as applied to Mr. Johnson without measuring the mitigating power of his youth against the other facts and circumstances of his character and background revealed at trial. *See Eddings v. Oklahoma*, 455 U.S. 104, 115-116 (1982) (noting that mitigating value of defendant's youth is increased where his background reveals emotional disturbance and turbulent home environment). Of course, if this Court concludes that the absence of additional instructions, in light of Mr. Johnson's *other* mitigating evidence, requires resentencing, Sup. Ct. Rule 24.1 (a) permits the Court to address such a plain error.

[15] *See* Tex. Pen. Code § 19.03 (a) (2) (West ed. 1992).

Court's repeated refusal to require that jurors be provided a specific definition of "deliberately," this Court's fears have been realized in practice. *See Penry*, 492 U.S. at 322-323.[16]

But even assuming *arguendo*, as this Court did in *Penry*, that the jurors measured Mr. Johnson's conduct against some standard higher than mere "intent," it is plain that the tendency of his youth to prove or disprove the "deliberateness" of his actions did not necessarily bear on his culpability. After all, as this Court noted in *Penry*, Mr. Penry's actions in his offense and its aftermath indicated substantial planning and forethought. *Id.* at 322. If a reasonable juror could have concluded that Mr. Penry's reduced culpability, resulting from his mental retardation, warranted a life sentence notwithstanding the calculated nature of his crime, surely a reasonable juror could have reached the same conclusion with respect to nineteen-year-old Dorsie Johnson.[17] Mr. Johnson's youth, like Mr. Penry's

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[16] The term "deliberate," as applied to homicide, came into the law in the famous Pennsylvania statute of 1792 that created the offense of "first degree murder," a capital crime, as distinct from "second degree murder," which was punished by imprisonment. The term does not, however, describe conduct significantly different from "intentional" or "purposeful" conduct:

> [c]ourts have repeatedly observed that deliberation and premeditation require no particular period of reflection; a very short time before the plan is formed and, once formed, executed, is enough. For this reason, and because it is so unclear what kind or quality of deliberation is required, the formula has been criticized for giving juries power to dispense verdicts of different severity without any workable standard to guide them.

2 Encyclopedia of Crime and Criminal Justice at 858 ("Homicide") (Sanford Kadish ed. 1983). In the same fashion, the bare terms of the first special issue do not suggest "what kind or quality of deliberation" might merit a death sentence for a particular defendant.

[17] This inference is even stronger where, as here, the evidence indicated that Mr. Johnson was asked to assist in the robbery only a

cognitive deficit, made him generally "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct," notwithstanding the "deliberate" character of his actions in committing the crime. *Penry*, 492 U.S. at 322-323. Because "personal culpability is not solely a function of a defendant's capacity to act 'deliberately,' " this Court cannot be certain that the jury's determination that Mr. Johnson acted "deliberately" entailed the "reasoned moral response" that he should die for his "deliberate" actions—particularly when the standard for "deliberateness" under state law is *de minimis*. *Penry*, 492 U.S. at 322.

The Texas Court of Criminal Appeals has interpreted and applied the first special issue in an extremely narrow manner, focusing on a single point in time. That court has held repeatedly that evidence of "a moment of deliberation" suffices to support an affirmative finding. *Kinnamon v. State*, 791 S.W.2d 84, 95-96 (Tex. Crim. App. 1990). *See also Havard v. State*, 800 S.W.2d 195 (Tex. Crim. App. 1989). As a matter of state law, then, the first special issue has always been understood as an extremely limited inquiry into a matter of historical *fact*, and has never encompassed any broad examination of the defendant's moral culpability.[18]

short time before it took place; Mr. Penry, by contrast, had been planning the rape/robbery of his victim for months. *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985).

[18] The Texas Court of Criminal Appeals, indeed, has repeatedly and forcefully declared that the capital sentencing jury's task is simply to answer the factual "special issue" questions according to their oath, and not to engage in any broader inquiry into the defendant's moral culpability. *See, e.g., Trevino v. State*, 815 S.W.2d 592, 621 n.11 (Tex. Crim. App. 1991) ("The Supreme Court failed to understand [in *Penry*] that under Texas law the jury does not 'impose the death penalty.' The jury in a capital case decides three special issues and, upon an affirmative finding to each, 'the court shall sentence the defendant to death.' As such, the high Court failed to inform this Court how the jury is to give 'mitigating effect' to evidence that is not capable of

Perhaps more significantly, even if the Texas courts have embraced some special, distinct definition for "deliberateness," as counsel for Respondent suggested before this Court earlier this Term, they have resolutely kept that definition secret. The Texas courts have refused, without exception, to permit (much less require) the *jury* to be instructed regarding the meaning of "deliberateness." *See* Tr. of Oral Argument in *Graham v. Collins*, No. 91-7580 at 28, 32; *see also, e.g., Lewis v. State*, 815 S.W.2d 560, 563 (Tex. Crim. App. 1991) ("We have consistently rejected such claims [asking that "deliberately" be defined] for the past 13 years, and decline to reconsider our settled precedents") (collecting cases). In light of Texas' continuing refusal to instruct the jury regarding "deliberateness," any assertion that the first special issue affords a meaningful vehicle for the consideration of a youthful defendant's personal culpability is unfounded speculation at best.[19]

being considered. . . .") (Citation omitted); *Boyd v. State*, 811 S.W.2d 105, 120 (Tex. Crim. App. 1991) ("We note at the outset that the Texas sentencing scheme does not allow the jury to actually assess a sentence; a jury's role is limited to answering the three special issues. . . ."); *Knox v. State*, 744 S.W.2d 53 (Tex. Crim. App. 1987) ("Since jurors do not actually 'sentence' a defendant in Texas capital cases, their attention should be directed only to answering the special issues without regard to the sentence that will ultimately be imposed.").

[19] The hazards of assuming that the first special issue affords a vehicle for searching inquiry into moral culpability are reflected in this striking statistic: the Texas Court of Criminal Appeals has *never* found the evidence in a particular case *insufficient* to sustain an affirmative answer to the first special issue. Moreover, as the Texas Court of Criminal Appeals conducts its sufficiency analysis, it often focuses exclusively on the circumstances surrounding the commission of the offense (e.g., the number and type of wounds) and not at all on aspects of a defendant's background and character that might make him less culpable for the crime. *See Narvaiz v. State*, 840 S.W.2d 415 (Tex. Crim. App. 1992) (evidence that defendant stabbed victim 63 times); *Green v. State*, 840 S.W.2d 394 (Tex. Crim. App. 1992) (fingerprints on murder weapon and testimony of former cellmate that defendant shot the vic-

Even if the Texas court had articulated a broad conception of "deliberateness" (which it emphatically has not), the language of the first special issue "limit[s] the inquiries to which [the defendant's mitigating evidence] is relevant so severely" that the evidence cannot play a meaningful part in the jury's sentencing decision. *McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment). Similarly, the trial court's additional instruction to the jury, directing them to consider "all the evidence . . . whether aggravating or mitigating in nature," in "determining each of these Issues," *see* Tr. 98, did not afford the jury an adequate opportunity to assess Mr. Johnson's moral culpability.

Indeed, rather than *curing* the problem *Penry* recognized in the application of the former statute, the trial

tim); *Earhart v. State*, 823 S.W.2d 607 (Tex. Crim. App. 1991) (victim was bound, shot in back of head and buried in trash heap); *Farris v. State*, 819 S.W.2d 490 (Tex. Crim. App. 1991) (defendant waited for officer to approach on foot before shooting at point blank range); *Havard v. State*, 800 S.W.2d 195 (Tex. Crim. App. 1989) (defendant aimed rifle at officer's head, yelled freeze, and then shot the officer between the eyes); *Webb v. Texas*, 760 S.W.2d 263 (Tex. Crim. App. 1988) (forensic evidence that a number of nonmortal shooting wounds were inflicted before defendant fired shot that killed victim); *Williams v. State*, 773 S.W.2d 525 (Tex. Crim App. 1988) (evidence defendant planned robbery and stopped shooting only when accomplice suggested victims would die from wounds); *Westley v. State*, 754 S.W.2d 224 (Tex. Crim. App. 1988) (defendant pursued victim in store to shoot at close range); *Rivera v. State*, 725 S.W.2d 311 (Tex. Crim. App. 1986) (victim was repeatedly stabbed); *Rector v. State*, 738 S.W.2d 235 (Tex. Crim. App. 1986) (victim was brought to isolated area, stripped of clothing and shot in the head); *Goodman v. State*, 701 S.W.2d 850 (Tex. Crim. App. 1985) (evidence sufficient for finding of deliberateness despite defendant's retardation); *Buxton v. State*, 699 S.W.2d 212 (Tex. Crim. App. 1985) (eyewitness identification of defendant's presence in store where robbery and murder occurred); *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985) (mentally retarded defendant's confession he planned to rape victim and kill her so she would not "squeal"); *Duffy v. State*, 567 S.W.2d 197 (Tex. Crim. App. 1978) (defendant entered victim's home and stabbed her repeatedly).

court's "mitigation" instruction only *described* it. The special issues provided the *only* vehicle for jurors' consideration of mitigating evidence under the former statute, including evidence bearing directly on personal culpability, such as a teenage defendant's youth. Instructing the jury that it could consider all mitigating evidence as it decided the narrow factual question of "deliberateness" did not permit the jury to return a "no" answer based on Mr. Johnson's reduced culpability. The inquiry into deliberateness cannot be transformed into an inquiry regarding lessened culpability, because the term "deliberateness" as it is fairly understood (and as the Texas courts have confirmed) concerns only the moment in time during which the defendant acted; the question does not address the more crucial question of whether his personal circumstances and youthful judgment made him less capable of understanding the meaning and consequences of his admittedly "deliberate" acts.

The difficulties of squeezing the moral question of reduced culpability into a narrow factual inquiry are evident in other contexts. For example, no one would suggest that a jury in a guided-discretion jurisdiction, such as Florida, could consider a teenage defendant's "personal culpability" in determining, for example, whether "the capital felony was committed by a person under sentence of imprisonment."[20] Just as a youthful defendant's culpability would be irrelevant in determining such a narrow question of fact, so nineteen-year-old Dorsie Johnson's culpability was irrelevant in determining the *factual* question whether he acted "deliberately" in causing the victim's death. Thus, there is a reasonable likelihood that the jury's reasoned moral response to his youth could not find expression in their answer to the first special issue.

[20] *See* Fla. Stat. Ann. § 921.141(5) (Supp. 1976-1977); cited in *Proffitt v. Florida*, 428 U.S. 242, 248 (1976).

Significantly, the first special issue contained other language that, reasonably understood, limited and informed the jurors' understanding of their task, and which increased the likelihood that their response to Mr. Johnson's culpability could not find expression in their answer to the first special issue. Namely, in addition to asking whether the defendant acted "deliberately," two other key phrases framed and narrowed the inquiry:

> Whether the *conduct of the defendant that caused the death of the deceased* was committed deliberately *and with the reasonable expectation that the death of the deceased or another would result*;

(former) Tex. Code Crim. Proc. Art. 37.071 (b) (1) (emphasis added). Both highlighted phrases confined the assessment of "deliberateness" to the act that *caused the death*.[21] Fairly read in context, the language of the first special issue as a whole focused on the homicidal *act*, to the exclusion of the defendant's character and background. As the Chief Justice has emphasized, "the doctrine of *noscitur a sociis* is based on common sense," *Brown*, 479 U.S. at 543; this Court must consider the probable effect of this additional language on the jury's understanding of the first special issue.

3. The second special issue, by focusing on Mr. Johnson's likely behavior in the future, offered no vehicle through which the jury could consider Mr. Johnson's culpability for the offense already committed.

Nor could the jury give Mr. Johnson's youth and background constitutionally adequate consideration under the

[21]The latter half of the special issue, in particular, seems tailored to an *Enmund*-type "eligibility" determination, rather than to a broader assessment of moral culpability. *See* and *compare* the revised Texas capital sentencing statute, Tex. Code Crim. Proc. Art. 37.071 (Vernon's ed. 1992) (replacing the "deliberateness" inquiry with an explicit *Enmund* finding); *see also Enmund v. Florida*, 458 U.S. 782 (1982).

second special issue. As Justice Souter has recognized, the "future dangerousness" inquiry has an entirely utilitarian function; it attempts to identify those convicted murderers who are beyond reasonable incapacitation, and who will therefore pose a "continuing threat" to the community. *Graham*, ___ U.S. ___ , 113 S.Ct. 892, 922 (1993) (Souter, J., dissenting). Accordingly, Mr. Johnson's jury could consider his youth under the second special issue only if it believed that his youth increased the likelihood of his rehabilitation. The jury could not, however, answer "no" to the second special issue based on a "backward-looking" assessment of Mr. Johnson's reduced moral culpability. Indeed, if the jury concluded that Mr. Johnson was incapable of rehabilitation (or even that Mr. Johnson's rehabilitation would be a long time in coming), it could not have given Mr. Johnson a sentence less than death based on its view that he did not fully appreciate the meaning of his actions at the time of the crime.

The "forward-looking" perspective of the second special issue thus profoundly distorts the consideration of relevant mitigating evidence; such evidence can only affect the answer to the second special issue to the extent that it tends logically to prove or disprove the likelihood of future violent acts. Thus, a jury limited to the second special issue can only give effect to evidence about the defendant's character and background—about past or present facts—in making predictions about the future; because many such facts have only a tangential, attenuated relationship to the defendant's future behavior, substantial mitigating aspects of such relevant evidence are inevitably "lost in translation."[22]

[22] The insight that a "future dangerousness" inquiry is inadequate to permit full consideration of a capital defendant's youth is further confirmed by *Eddings*. Under the Oklahoma scheme at issue in that case, the trial court was required to determine whether Eddings posed a "continuing threat to society." *See Eddings*, 455 U.S. at 107, citing

At least two Members of the present Court have acknowledged this vital conceptual distinction between evidence about personal culpability and evidence predicting future behavior. In *Truesdale v. Aiken*, 480 U.S. 527 (1987), the Court summarily reversed a decision of the South Carolina Supreme Court, which had refused retroactively to apply this Court's decision in *Skipper v. South Carolina*, 476 U.S. 1 (1986).[23] Justice Powell argued in dissent that *Skipper* did not follow from *Lockett* and *Eddings*, because it concerned "evidence that was *unrelated to culpability*. Rather, the State was required to admit evidence relevant to the defendant's probable future conduct as a prisoner." 480 U.S. at 528 (Powell, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting) (emphasis added). That is, the dissenters explicitly recognized that a judgment about a defendant's culpability is, at least as a logical matter, not necessarily coextensive with a prediction of his future conduct.

There is nothing unconstitutional about a State's choice to emphasize the deterrence rationale[24] in structuring its

Okla. Stat., Tit. 21, § 701.12(7) (1980). The judge evidently weighed Eddings' youth, along with the other facts about his background and the circumstances of the offense, in making his findings. In reviewing Eddings' claim, this Court did not suggest that such foreshortened, coincidental "consideration" of a teenage defendant's youth might satisfy the Eighth Amendment. On the contrary; this Court properly concluded that the risk that Eddings had been sentenced to death despite the existence of factors calling for a lesser sentence was intolerably great, and vacated his death sentence. 455 U.S. at 116-117, 119.

[23] In *Skipper*, the Court had held that a capital defendant was entitled to present evidence of his successful adjustment to confinement *after* his capital offense in support of a sentence less than death *for* that offense. *Skipper*, 476 U.S. at 4.

[24] This Court has suggested that the permissible rationales which may constitutionally support capital punishment are "retribution and deterrence." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

capital sentencing statute.[25] However, if the State limits the jury's factual inquiry to "future dangerousness," it risks denying the defendant an assessment of his present moral culpability—a determination this Court's Eighth Amendment cases require.[26] Because Texas has never directed the jury to fully consider the defendant's personal culpability as part of answering the *first* special issue, the "future dangerousness" question—which, as discussed above, is singularly ill-fashioned for the purpose—may be the only vehicle for the jury's assessment of reduced culpability. That consequence helps explain why Mr. Johnson's youth and background had mitigating relevance "outside the scope" of the two narrow questions to which his jury was limited, and why the trial court's feeble instruction to consider mitigating evidence *in answering the special issues* could not correct this pervasive constitutional flaw.

At the same time that Mr. Johnson's youth could not be considered as limiting his moral culpability, his youth might have convinced a jury that he was *more* likely to

[25] Indeed, at least two other states employ a "continuing threat" aggravating factor, but do so in statutory schemes that properly permit the sentencer to assess the *aggravating* evidence of "dangerousness," and then *independently* to determine whether the *mitigating* evidence nevertheless justifies a life sentence. *See* Va. Code Ann. § 19.2-264.4C (Michie 1992) (future dangerousness one of two aggravating factors; one must be established before death may be imposed); Va. Code Ann. § 19.2-264.4B(v) (age of the defendant is mitigating factor which may support life sentence); *See also* Okla. Stat., Tit. 21, § 701.12 (7) (1980) ("continuing threat" aggravator); Okla. Stat., Tit. 21, § 701.10 (1980).

[26] This Court's cases suggest that a State which designed its capital punishment system only to effectuate the "deterrence" rationale, and to preclude the consideration of "culpability" evidence (that is, evidence that goes to the appropriate *retribution* for the offense), would violate the Eighth Amendment. After all, if a State were free to ignore the retributive basis for the sanction, there would be no reason for invalidating certain sentences as disproportionate, since "proportion" surely has no relationship to the deterrent effect of the potential penalty. *See, e.g., Coker v. Georgia*, 433 U.S. 584 (1977).

be a danger in the future. Simply put, youth has an aggravating "edge" under the second special issue because the jury must consider a longer period of time during which the young defendant may commit some violent act, than a jury must consider when faced with an older offender.[27]

Justice Souter has noted this same pernicious effect:

> [T]he second special issue [is inadequate] even to take account of the possibility that [the youthful defendant] may be less dangerous as he ages. . . . [Such a defendant] could well be held dangerous in the future by reason of continuing youth . . . [and his youth would thus be] considered under the second issue as aggravating, not mitigating.

Graham, ___ U.S. at ___, 113 S.Ct. at 925 (Souter, J., dissenting). A plurality of the Texas Court of Criminal Appeals has agreed:

> Viewing mitigating evidence in the light most favorable to the jury's [affirmative] answer [to the second special issue] . . . may mean in some cases actually considering evidence proffered in mitigation, such as *youth*, drug dependency, a history of child abuse, etc., . . . to militate in favor of an affirmative answer in the narrower confines of special issue two itself.

[27] Of course, evidence relevant to a capital defendant's fate may often have this "two-edged" quality. For example, evidence of drug abuse, while potentially mitigating, *see Bell v. Ohio*, 438 U.S. 637, 641 (1978), could also be perceived as aggravating by a particular juror since it might reflect voluntary lawless behavior. The key difference is that under the former Texas statute, a reasonable juror who regarded such "two-edged" evidence as *mitigating*, and wanted to impose a life sentence on that basis, could not do so within the straitjacket of the unadorned special issues.

Burns v. State, 761 S.W.2d 353, 355 (Tex. Crim. App. 1988).[28]

The prosecutor's closing argument, of course, echoed this same theme; he conceded that it was possible that Mr. Johnson's potential for violence might fade "twenty or forty years down the road," but insisted that the jury should not take that chance. JA 91, 107. This argument can only be understood to focus on the *immediate* future—a period with respect to which Mr. Johnson's youth was singularly aggravating under the narrow inquiry of the second special issue.

Observations about the potentially "aggravating" treatment of youth reflect a more basic fact about the second special issue. The second special issue is designed to be an open-ended inquiry that renders immediately and obviously relevant every remotely "bad" act a person has ever committed. The Texas Court of Criminal Appeals has assiduously interpreted the second special issue to allow the admission of all sorts of aggravating evidence, seemingly without regard to its underlying reliability. For example, the second special issue can give aggravating effect to evidence of unadjudicated offenses, *Motley v. State*, 773 S.W.2d 283 (Tex. Crim. App. 1989); juvenile offenses, *Goodman v. State*, 701 S.W.2d 850 (Tex. Crim. App. 1985); and bad reputation, *James v. State*, 772 S.W.2d 84 (Tex. Crim. App. 1989), to name but a few.

The second special issue is a "gatekeeper," one which swings wide to admit evidence in aggravation, but opens

[28] See also Stewart v. State, 686 S.W.2d 118, 125 (Tex. Crim.App. 1984), (Clinton, J., dissenting) (defendant's youth has "tremendous specific probative weight in favor of answering the future dangerousness question 'yes' "); *see also Eddings*, 455 U.S. at 126 n. 8 (Burger, C.J., dissenting) (citing studies indicating that a majority of violent youths continue to be violent for some indeterminate period before "aging out").

barely a crack for evidence supporting a lesser sentence.[29] The present case offers a classic example: the prosecutor presented—at great length and in elaborate detail, both through live witnesses and documentary evidence—numerous incidents from Dorsie's childhood that are characteristic of unruly pre-teens. Thus, for example, the jury could fully consider and give effect to evidence that twelve-year-old Dorsie Johnson gave his seventh-grade teacher "the finger," while it paradoxically could give no effect to the mitigating aspects of his youth.

The second special issue, then, failed in this case as a vehicle for the jury's consideration of Mr. Johnson's youth as it bore on his personal culpability. A prediction of future behavior is not the same thing as an assessment of moral culpability for a crime already committed; thus, the question's exclusive focus on the prediction of future events rendered the most salient attributes of Mr. Johnson's youth tangentially relevant at best. Worse, the preclusive effect of the "forward-looking" query rendered the most important qualities of Mr. Johnson's youth, which bore directly on his moral culpability, wholly irrelevant. In addition, the jury could reasonably have concluded that the nineteen-year-old Mr. Johnson, by reason of his continuing youth, would pose a threat of violence for some time—requiring an affirmative answer to the second special issue. The narrow focus of the second special issue, while inviting unrestrained introduction of aggravating evidence, did not

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[29] The court below has interpreted the second special issue with such breadth that seemingly trivial transgressions are adequate to sustain an affirmative finding. For example, the Texas court has held that an affirmative finding to the second special issue—and therefore a sentence of death—is appropriately predicated on evidence that a defendant "unlawfully shot a cow" or "wantonly shot and killed a buffalo." *Farris v. State*, 819 S.W.2d 490 (1990). Likewise, Texas may condemn a defendant to death based on evidence from a high school vice-principal that the defendant was truant, smoked cigarettes, and disrupted classes. *Kunkle v. State*, 771 S.W.2d 435, 446 (Tex. Crim. App. 1986).

in any way provide a vehicle for the essentially *moral* inquiry underlying the individualization requirement. Because the jury could have concluded that Mr. Johnson's reduced moral culpability justified sparing his life despite his status as a likely "future danger," but had no way to express that reasoned moral response in answering the factual inquiry of the second special issue, Mr. Johnson's resulting death sentence violates the Eighth Amendment.

CONCLUSION

By its own terms, the former Texas statute permits only two narrow *factual* determinations, while this Court's sentencing jurisprudence now makes plain that capital sentencing is first and foremost a *moral* inquiry into the *appropriateness* of a death sentence.[30] This Court's recognition that individualization, and not rigidity, is the watchword of such a jurisprudence reflects a thoughtful and profound movement in Anglo-American criminal law. As Radzinowicz has noted, inflexibility "disregarded the fundamental principle which is essential to any effective system of crime-prevention and which has been aptly described by Raymond Saleilles as *le principe de l'individualisation de la peine.*" Radzinowicz, 1 *A History of English Criminal Law and Its Administration* at 14 (1948).[31]

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[30] To say that the capital sentencing inquiry is moral is not to say that it is unguided, or unprincipled, or without meaningful limitation, as Justice Thomas has suggested. *Graham*, ___ U.S.at ___, 113 S.Ct. at 912, (Thomas, J., concurring). It is merely to recognize that the factors which weigh in the decision will reflect human experience, legal tradition, and community values as much as empirical fact. Indeed, the moral character of the sentencing inquiry lies in the jury's serious assessment of the profound *consequences* of the empirical facts about the offense and the offender, as reflected in the choice between life and death.

[31] Radzinowicz cites numerous authors endorsing this view, foremost among them Sir James FitzJames Stephen. *Id.* at 14 n. 46.

Though Dorsie Lee Johnson was only nineteen at the time of the offense, and although the mitigating power of his youth was heightened by the other facts and circumstances of his background, the jury could consider only whether he had acted "deliberately" and whether he might pose a "continuing threat" of criminal violence. Once it answered both questions in the affirmative, a death sentence was mandatory. The trial court's weak instruction to consider "mitigating" evidence *in answering the special issues* failed to broaden the jurors' discretion to consider Mr. Johnson's youth and background, because it still forced them to consider his mitigating evidence only insofar as it tended to disprove the aggravating special issues, not as the evidence bore on his personal moral culpability.

Here, as in *Penry*, there is a reasonable probability that the substantial mitigating qualities of Mr. Johnson's youth and background could have persuaded a rational juror that death was an excessive punishment for his crime. The former statute, however, forced the jurors to ignore any aspect of Mr. Johnson's youth not related to either his *mens rea* at the time of the homicide, or the likelihood that he would continue to pose a "threat" for some unspecified period in the future. Accordingly, this Court cannot be confident that the jury's "reasoned moral response" to Mr. Johnson's personal culpability is reflected in its bare affirmative answers to the special issues.

As this Court has held, striking down a mandatory death provision, "the inferences to be drawn concerning a defendant's character and moral culpability may vary depending on the nature of the past offense." *Shuman*, 483 U.S. at 81. In precisely the same manner, the inferences to be drawn concerning Mr. Johnson's moral culpability could be strongly affected by his youth and background, even after the jury had determined that he acted with the necessary minimal "deliberateness," and might continue to be violent for some unspecified interval in the future. Because the jury had no vehicle for expressing the reasonable

inference—the "reasoned moral response"—that Mr. Johnson's youth and background rendered him less culpable, and thus rationally warranted a sentence less than death notwithstanding the affirmative answers to the special issues, the resulting death sentence violates the Eighth Amendment.

Petitioner Dorsie Lee Johnson, Jr., thus respectfully prays that this Court reverse the judgment of the Texas Court of Criminal Appeals in his case and remand with directions to vacate his unconstitutional sentence of death.

Respectfully submitted,

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No. 92-5653

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1992

DORSIE LEE JOHNSON,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Writ of Certiorari
To the Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Did the Texas capital sentencing statute unconstitutionally preclude the jury from giving full mitigating effect to the petitioner's youthful age at the time of the offense?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Course of Proceedings and Disposition Below	3
B. Statement of Facts	4
1. Guilt-innocence phase	4
2. Punishment phase	7
SUMMARY OF ARGUMENT	11
ARGUMENT	14

TABLE OF CONTENTS, continued

	Page
I. THE COMPETING COMMANDS OF THE EIGHTH AMENDMENT ARE RECONCILED BY DISTINGUISHING RULES THAT GOVERN WHAT THE JURY MUST BE PERMITTED TO CONSIDER AND RULES THAT GOVERN HOW THE STATE MAY GUIDE THAT CONSIDERATION.	14
A. The states are allowed wide latitude in guiding how the jury may consider mitigating evidence.	16
B. The eighth amendment governs what mitigating evidence the sentencer must be permitted to consider.	21
1. Individualized sentencing is intended to further, rather than undermine, rationality in capital sentencing.	21

TABLE OF CONTENTS, continued

Page

2. **The rule of *Lockett* establishes that the state may not exclude constitutionally relevant evidence or prevent the sentencer from giving it any mitigating weight.** 26

C. ***Texas reasonably guides sentencer discretion through special issues that incorporate traditional sentencing concerns.*** 30

II. **THE SPECIAL ISSUES PERMITTED THE JURY TO GIVE MITIGATING EFFECT TO ALL SUBSTANTIAL PROFFERED ASPECTS OF JOHNSON'S YOUTH, IN COMPLIANCE WITH THE EIGHTH AMENDMENT.** 34

CONCLUSION 48

TABLE OF AUTHORITIES

Cases	**Page**
Adams v. Texas, 448 U.S. 38 (1980)	32,33
Barclay v. Florida, 463 U.S. 939 (1983)	28
Barefoot v. Estelle, 463 U.S. 880 (1983)	23
Bellotti v. Baird, 443 U.S. 662 (1979)	39
Blystone v. Pennsylvania, 494 U.S. 299 (1990)	*passim*
Boyde v. California, 494 U.S. 370 (1990)	*passim*
California v. Brown, 479 U.S. 538 (1987)	18,25,35
Demouchette v. Collins, No. 92-5914, *cert. denied*, ___ U.S. ___, 113 S. Ct. 27 (1992)	43
Earhart v. Texas, No. 92-8105 (pending on petition for writ of certiorari)	19
Eddings v. Oklahoma, 455 U.S. 104 (1982)	*passim*
Engle v. Isaac, 456 U.S. 107 (1982)	17
Enmund v. Florida, 458 U.S. 782 (1982)	24
Estelle v. McGuire, __ U.S. __, 112 S. Ct. 475 (1991)	12
Franklin v. Lynaugh, 487 U.S. 164 (1988)	12,17,37
Furman v. Georgia, 408 U.S. 238 (1972)	*passim*
Gardner v. Florida, 430 U.S. 349 (1977)	18
Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992) (en banc)	44,46,47

TABLE OF AUTHORITIES, continued

Cases	Page
Graham v. Collins, ___ U.S. ___, 113 S. Ct. 892 (1993)	*passim*
Gregg v. Georgia, 428 U.S. 153 (1976)	14,17,23,26
Harmelin v. Michigan, 501 U.S. ___, 111 S. Ct. 2680 (1991)	22
Hitchcock v. Dugger, 481 U.S. 393 (1987)	27
Hopper v. Evans, 456 U.S. 605 (1982)	22
Jackson v. Virginia, 443 U.S. 307 (1979)	37,38
Jurek v. State, 522 S.W.2d 934 (Tex.Crim.App. 1975)	42
Jurek v. Texas, 428 U.S. 262 (1976)	30,31,42,45
Lockett v. Ohio, 438 U.S. 586 (1978)	*passim*
McKoy v. North Carolina, 494 U.S. 433 (1990)	15,27
Penry v. Lynaugh, 492 U.S. 302 (1989)	*passim*
Proffitt v. Florida, 428 U.S. 242 (1976)	30
Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977)	23
Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976)	21,23
Saffle v. Parks, 494 U.S. 484 (1990)	*passim*

TABLE OF AUTHORITIES, continued

Cases	Page
Schad v. Arizona, 501 U.S. ___, 111 S. Ct. 2491 (1991)	17
Skipper v. South Carolina, 476 U.S. 1 (1986)	17,23,27
Stanford v. Kentucky, 492 U.S. 361 (1989)	43
Stringer v. Black, ___ U.S. ___, 112 S. Ct. 1130 (1992)	20
Sumner v. Shuman, 483 U.S. 66 (1987)	23
Teague v. Lane, 489 U.S. 288 (1989)	16
Tison v. Arizona, 481 U.S. 137 (1987)	24
Walton v. Arizona, 479 U.S. 639, 110 S. Ct. 3047 (1990)	19,20
Williams v. New York, 337 U.S. 241 (1949)	23
Woodson v. North Carolina, 428 U.S. 280 (1976)	*passim*
Zant v. Stephens, 462 U.S. 862 (1983)	17,20
Constitutions, Statutes and Rules	
U. S. Const., amend. VIII	*passim*
U. S. Const., amend. XIV	2,16
28 U.S.C. § 944(i)	43
28 U.S.C. § 1257(3)	2

TABLE OF AUTHORITIES, continued

Constitutions, Statutes and Rules	**Page**
FLA. STAT. § 921.141(6) (Supp. 1976-77)	31
OHIO REV. CODE ANN. § 2929.04(B) (1975)	31
TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981)	2,3
TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 1974)	3
Miscellaneous	
Bieler, *Death be Not Proud: A Note on Juvenile Delinquent Punishment*, 7 N.Y.L. Sch. J. Hum. Rts. 179 (1990)	44
Faltersack, *Stanford v. Kentucky, The Minimum Age for the Maximum Penalty--Death*, 23 J. Marshall L. Rev. 453 (1990)	44
Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. Rev. 821 (1988)	44
Homan, *The Juvenile Death Penalty: Counsel's Role in the Development of a Mitigation Defense*, 53 Brook. L. Rev. 767 (1987)	
Vanore, *The Decency of Capital Punishment for Minors; Contemporary Standards and the Dignity of Juveniles*, 61 Ind. L. J. 757 (1986)	44
Walkover, *The Infancy Defense in the New Juvenile Court*, 31 U.C.L.A. L. Rev. 503 (1984)	44

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RESPONDENT'S BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent,[1] by and through the Attorney General of Texas, and files this Brief.

OPINIONS BELOW

The opinion of the *en banc* Court of Criminal Appeals of Texas affirming Johnson's conviction and sentence is published at 773 S.W.2d 322 (Tex. Crim. App. 1989), and is included in

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[1] For clarity, Respondent will be referred to as "the state" and Petitioner Dorsie Lee Johnson as "Johnson".

the Joint Appendix at page 155 *et seq.*[2] The state court's opinion on Johnson's motion for rehearing, delivered May 27, 1992, is not published. JA 178-81.

JURISDICTION

Johnson has invoked the Court's jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Johnson bases his claim on the eighth and fourteenth amendments to the United States Constitution. He challenges the application of Article 37.071 of the Texas Code of Criminal Procedure, which at the time of his trial provided in pertinent part:

> (b) On conclusion of the presentation of the evidence, [at the sentencing phase of a capital murder trial] the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberate-ly and with the reasonable expecta-tion that the death of the decedent or another would result;

[2] Hereafter, the Joint Appendix will be designated by "JA", followed by relevant page numbers. "R." will refer to the record of state trial proceedings, and "Tr." to the trial transcript, with citation to applicable volume and page numbers.

> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, of the deceased.
>
> * * *
>
> (e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death.

TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Johnson was charged by an indictment filed in the 132nd Judicial District Court of Scurry County, Texas, with the capital offense of intentional murder of Jack Huddleston during the course of a robbery. See TEX. PENAL CODE ANN. §19.03(a)(2) (Vernon 1974). On November 12, 1986, a jury found Johnson guilty of capital murder. A separate hearing on punishment ensued, and the jury on November 14, 1986, returned affirmative answers to the two special issues submitted pursuant to article 37.071(b) of the Texas Code of Criminal Procedure. In accordance with Texas law, the trial court assessed Johnson's punishment at death by lethal injection.

Johnson appealed to the Court of Criminal Appeals of Texas, which affirmed the conviction and sentence on June 21, 1989. *Johnson v. State*, 773 S.W.2d 322 (Tex. Crim. App. 1989). JA 155-77. In an unpublished opinion, the state appellate court on May 27, 1992, denied Johnson's motion for rehearing. JA 178-81. This proceeding followed, and, on February 19, 1993, the Court granted Johnson's petition for writ of certiorari. *Johnson v. Texas*, ___ U.S. ___, 113 S. Ct. 1148 (1993); JA 182.

B. Statement of Facts

1. Guilt-innocence phase

In the early morning hours of March 23, 1986, Johnson met Amanda and Janet Miles at Butler's Cafe (also called the Weekend Cafe) in Colorado City, Texas. R. XIV 242-44, 474, 487. He agree to accompany the Miles sisters to Snyder, Texas,[3] where Janet's boyfriend lived. R. 246, 475, 488. Janet arranged for her boyfriend to drive her home and, before leaving, gave a pistol to Amanda with instructions to give it to their mother for safekeeping and to hide it from Johnson. R. 251-52, 475, 488.[4]

According to Johnson's confession, R. 475-76, 488-89, Amanda then suggested that they rob Allsup's, an all-night convenience store in Snyder. Johnson readily assented, and the two agreed to leave no witnesses. After "casing" the store[5] and

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[3] Snyder is approximately 25 miles away from Colorado City.

[4] Janet purchased the gun on March 1, 1986, at the Snyder Pawn Shop. It was a .25 caliber semi-automatic Excam pistol, serial number M148676. R. 244-45, 234-35. Police obtained the pistol from George Miles, Sr., the father of Amanda and Janet, on April 8, 1985.

[5] Laura Fisk and her niece were at Allsup's sometime after 3:00 a.m. on March 23, R. XIV 78-80, and she identified Johnson as being present at the time, R. XIV 95-96.

ascertaining that only one employee was present, Johnson and Amanda left the store, drove around, and formulated a plan. Johnson was to lure the clerk into the cooler while Amanda emptied the cash register. Returning to Allsup's and parking at the side of the building, the pair entered the store. Johnson carried Janet Miles' .25 caliber pistol in the pocket of his jacket. Once inside the store, they made a pretense of selecting transmission fluid and, when another man entered the store,[6] lingered in the dairy section at the rear of the store. During this time, Johnson noticed that there were no gallon containers of orange juice on the shelves, and he saw a way to get the store clerk, Jack Huddleston, into the cooler as planned.

When the other customer departed, Johnson asked Huddleston whether there was any orange juice in gallon jugs, and, because none was on the shelves, Huddleston went to the walk-in cooler to check. Johnson followed and, once inside the cooler, pulled out the gun and announced the robbery. Huddleston put his hands up over his head. Johnson ordered him to lie face down on the floor, and Huddleston complied. As Huddleston lay on the floor, with his hands still positioned over his head, Johnson shot him once in the back of the neck. In accordance with their plan, Amanda emptied the cash registers of approximately $160[7] while Johnson was eliminating the witness. Each grabbed a carton of cigarettes on the way out. R. XIV 477-78, 491-92.

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[6] V.L. Buchanan was this other customer. He testified that he went to Allsup's at approximately 4:10 a.m. on March 23, 1986, as he did almost every day, in order to purchase a newspaper and cigarettes. R. XIV 115-16.

[7] There was no currency in either cash register. Randy Bates, area supervisor for Allsup's, performed a cash audit and found the registers approximately $160 short. R. XIV 191-93. This is consistent with company policy, under which night-time employees were to periodically place cash in excess of $150 in a "drop safe." R. XIV 275-76.

Rozel Huntsman stopped by Allsup's at approximately 4:30 a.m. on March 23, within minutes of the crime. She was in the process of delivering newspapers on her regular route and needed transmission fluid. R. XIV 129-31. Seeing no one inside the store, Huntsman called out. No one responded. R. XIV 132. Huntsman finally left the store after placing the two pints of transmission fluid she had selected on the check-out counter next to other items. R. XIV 133. Huntsman recalled seeing a Sunday newspaper, bottles of transmission fluid, and either matches or cigarettes on the counter. R. XIV 135-36. A short time later, between 4:30 and 4:40 a.m., Diana Allen discovered Huddleston's body and called the police. R. XIV 21-35.

At the scene of the crime, officers recovered physical evidence that connected Johnson to the crime. Inside the cooler, near Huddleston's head, Sergeant Whittenburg found a .25 caliber casing or hull under shelving.[8] R. XIV 66-69, 166-74. Ballistics tests revealed that this casing was fired from Janet Miles' gun. R. XIV 398. On the check-out counter, police found five pints of Valvoline transmission fluid,[9] a Sunday "Snyder Daily News" paper, and six books of paper matches. R. XIV 290, 297. All items were processed for fingerprints, and Johnson's prints were found on two of the plastic bottles of transmission fluid. Amanda Miles' fingerprint was found on one of the books of matches. R. XIV 344-46, 353-54. Consistent with Johnson's confession that he killed the deceased while Amanda cleaned out the registers, her footprint was found behind the checkout counter. R. XIV 149, 155-64, 222-24, 229-30.

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[8] The location of the bullet casing is consistent with being ejected from the gun while Johnson was standing at Huddleston's feet. R. XIV 71-73.

[9] Allsup's carried only one brand of transmission fluid. There were, however, two different types, one designed for Ford vehicles and the other designed for General Motors vehicles. R. XIV 303. The five bottles of transmission fluid on the counter included both types. R. XIV 186.

An autopsy revealed that Huddleston died from brain damage caused by a bullet wound. R. XIV 375. The bullet entered the back of Huddleston's neck, passed through the brain stem (which connects the brain to the rest of the body), and traveled through the brain until it struck bone. R. XIV 371-72. This path, along with an absence of powder marks on the deceased's skin or shirt, was consistent with Johnson having stood at Huddleston's feet when shooting him. R. XIV 374-75. In addition, ballistics tests showed that rifling marks on the .25 caliber slug removed from Huddleston's head during the autopsy were consistent with rifling marks made by Janet Miles' semi-automatic pistol. R. XIV 371, 394-97.

Later in the day of March 23, Johnson showed his share of the loot to his brother-in-law, Donald Ray Robinson. He told Robinson that he obtained the money from a robbery of Allsup's convenience store that he committed with Amanda Miles. When Robinson cautioned that he could be identified, Johnson laughed and said, "A dead man can't talk." R. XIV 418-19.[10]

2. Punishment phase

At the punishment phase, the state introduced evidence that Johnson's violent conduct was not limited to the capital offense. Approximately one week later, on the night of March 29, 1986, Johnson became involved in an argument at Shakey's Pizza Parlor in Snyder. As the other man involved drove away in a pickup, Johnson twice shot at him. He later bragged about the incident, laughing about how the man had to hunch down in the truck. R. XV 218-19, 231-39.

On April 8, 1986, less than three weeks after shooting and killing Jack Huddleston during a robbery, Johnson committed another armed robbery. This time assisted by George

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[10] While in jail pending trial, Johnson told another prisoner, Edward Ramshur, that he killed Huddleston pursuant to a plan to eliminate witnesses. R. XIV 434.

Miles, Jr., Amanda's brother, Johnson brutally attacked and robbed Don Burrus, the proprietor of a small grocery store in Colorado City. During the course of this robbery, Johnson shot Burrus in the face[11] and hit Burrus in the head with a wooden-handled hoe, breaking the handle. R. XV 291, 333. George Miles, Jr., stabbed Burrus in the back, leaving a wound four inches deep. R. XV 273, 333. Johnson correctly observes that "[t]hese wounds were not fatal." Petitioner's Brief at 7. Don Burrus did not die from his injuries but, as a result, required care twenty-four hours a day in a nursing home.

At the time he committed these crimes, Johnson was on adult felony probation stemming from his 1985 conviction of burglary in Waco, Texas. R XV 92-96. John Bahlmann, Johnson's probation officer, testified that on two occasions Johnson admitted using marijuana, which was a violation of the terms of his probation. Bahlmann attempted to work with Johnson so that probation would not be revoked, but Johnson was uncooperative and showed no inclination to comply with the conditions of his probation. R. XV 109-14.

Paula Williams and Beverly Jackson, two of Johnson's friends, also testified about his use of illegal drugs, including cocaine and marijuana. In addition, they described instances of Johnson's violent behavior. In March of 1986, Johnson threatened Williams and Jackson with an axe. R. XV 140-42, 152-56. On another occasion in March, he punched Jackson in the head and threw a large rock at her. R. XV 162-67. On the same day he shot, beat, and robbed Don Burrus, Johnson brandished a pistol and pointed it at Jackson. R. XV 171-75. Johnson's violence did not begin in March 1986, however; Williams testified that the previous summer, she saw a gun

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[11] The bullet struck just below Burrus' left eye socket and split into two pieces; one piece lodged at the base of Burrus' skull and the other went out his ear. R. XV 271.

knocked out of Johnson's hand during a fight. R. XV 138-39. Johnson had a bad reputation in the community for being a peaceful and law-abiding citizen. R. XV 142-44.

Johnson had exhibited violent and criminal behavior and refused to follow rules for some time. In December 1982, Johnson and Doug Smith burglarized CC Athletics in Snyder. R. XV 74-77, 83-84. Even as a student at Colorado City Schools in 1979 and 1980, Johnson hurt others. He grabbed Rocky Salazar around the neck and cut Salazar's back with a broken bottle; the wound required stitches. R. XV 7-10, 37. He stabbed another student in the hand with a pencil after making stabbing motions at that student's stomach. R. XV 42. Thereafter, Johnson cut Fred Dakan's leg with broken glass and, when Dakan asked why Johnson did this, responded by slashing Dakan's other leg. R. XV 15-16, 43-44.

In mitigation, Johnson presented the testimony of his father, Dorsie Johnson, Sr., who described his son's background and character. Johnson was raised in a Christian home and regularly attended church. R. XV 345-47, JA 11-14. He had a normal childhood, made friends, and participated in extracurricular sports activities. R. XV 350, 358-59, JA 16, 24.[12] Johnson's parents separated in 1980, and his mother moved to Waco. She died in October of 1984 following a stroke. R. XV 345, 348-49, JA 12, 14-15. According to Mr. Johnson, Johnson was devastated by the death of his mother and the murder of his sister approximately one year later. R. XV 354-57, JA 20-23.

Respecting youth as a mitigating factor, Mr. Johnson testified that Johnson was nineteen years old. He attributed

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[12] Mr. Johnson characterized Johnson's problems at school as "prankishness" and explained that the violent incidents were accidental and unintended consequences of such pranks. He also testified that the injuries were minor, and Johnson remained friends with the other students. R. XV 349-53, 384, JA 15-19, 46.

Johnson's criminal conduct to the influence of drugs and bad friends. According to Mr. Johnson, the drugs altered his son's reasoning and control, making him a different person. He opined that Johnson would change again if he were incarcerated and removed from these influences. R. XV 360-63, JA 25-28. "[L]ock him up, get him away from the environment and these habits and he could be a different person." R. XV 36, JA 26. "[H]e got the background and what it takes to be a decent person. Now, he's had both sides of it. He knows what it takes to make him a different person." R. XV 362, JA 27.

According to Mr. Johnson, nineteen is a "foolish age" when young men are "trying to step into manhood." R. XV 362, JA 27. He opined that young people do not evaluate right and wrong in the same manner that an older person would, or take into consideration the same factors. R. XV 385-86, JA 47-48. Drug use breaks down resistance, so that one acts impulsively and without time to evaluate the circumstances. R. XV 385-86, JA 47-48. Drugs also make one lose "the value of things," and Mr. Johnson believed his son would value life differently if he were sentenced to life imprisonment. R. XV 386, JA 48. If credited, Johnson's evidence showed that he was remorseful and had learned appropriately from his mistakes. Mr. Johnson testified that Johnson told him, "Daddy, I wish I could change it. I wish it never had happened. I wish I had listened more closely to what you said and the way I was raised. I just got off, got into that stuff. It got the best of me.'" R. XV 365, JA 30.

In rebuttal, Mike Bailey, a former deputy sheriff who had been assigned to the Scurry County Jail, testified that Johnson was a discipline problem. Johnson refused to comply with rules and orders. R. XV 390-93. On one occasion, Johnson told Bailey that he was going to get out of jail one of these days and, when he did, he was going to get Bailey. R. XV 391.

SUMMARY OF ARGUMENT

The Court has accommodated the competing requirements of the eighth amendment by recognizing the "simple and logical difference between rules that govern what factors the jury must be permitted to consider in making the sentencing decision, and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Saffle v. Parks*, 494 U.S. 484, 490 (1990). This distinction is reflected in both the nature of the defendant's right to individualized sentencing and the standard for review of claims of inadequate sentencer consideration of mitigating evidence.

The defendant's right to an individualized sentencing is preserved by constitutional "rules that govern what factors the sentencer must be permitted to consider in making the sentencing decision." *Id.* Under *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), the sentencer must be permitted to consider constitutionally relevant evidence about the defendant's background and character and the circumstances of the offense. As a corollary, relevant evidence must be permitted to affect the sentencing decision in a mitigating fashion. *Id.* at 608. Thus, the state may not exclude constitutionally relevant evidence from the sentencing decision, or place it beyond the jury's effective reach by precluding the jury from giving it mitigating weight on the ultimate sentencing issues. *Graham v. Collins*, ___ U.S. ___, ___, 113 S. Ct. 892, 902 (1993). In *Penry v. Lynaugh*, 492 U.S. 302 (1989), for example, a substantial mitigating aspect of Penry's retardation, his inability to learn from mistakes, had minimal relevance to the first and third special issues; because the condition was permanent, it could be given only aggravating effect under the future dangerousness issue.

Beyond assuring that the state's sentencing inquiries do not preclude the jury from considering relevant evidence, the eighth amendment does not govern "how the State may guide the jury in considering and weighing those factors in reaching a

decision." *Saffle v. Parks*, 494 U.S. at 490. This area remains the province of the states. Such latitude is warranted by considerations of federalism. The state legislature is best situated to perceive the values and concerns of its citizens and, in light of the state's particular history of administering capital punishment, to embody those values in procedures designed to reduce arbitrariness and caprice. Additionally, individualized sentencing is intended to further, rather than undermine, the goal of rationality. *Woodson v. North Carolina*, 428 U.S. 280, 302-03 (1976) (joint opinion of Stewart, J., joined by Powell and Stevens, JJ.). Even after the constitutional minimum of narrowing has been accomplished, therefore, the state may "structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde v. California*, 494 U.S. 370, 377 (1990), quoting *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988) (plurality opinion). And, because virtually every such effort limits how the sentencer may consider mitigating evidence and is subject to challenge as preventing the jury from giving enough effect to mitigating evidence, the Court should expressly hold that the eighth amendment does not regulate this area.

Where evidence is not actually excluded from the sentencing decision, the appropriate standard of review is whether there is a "reasonable likelihood" that the jury interpreted its instructions to prohibit consideration and weighing of relevant evidence. *Boyde v. California*, 494 U.S. 370, 379-80 (1990); *Estelle v. McGuire*, ___ U.S. ___, 112 S. Ct. 475, 482 & n.4 (1991). Here, the Court of Criminal Appeals correctly rejected Johnson's claim that the jury was precluded from giving effect to relevant evidence pertaining to his relative youth. All general attributes of "youth" identified by Johnson--impulsiveness, susceptibility to influence, and immature judgment and perspective--can be considered and given mitigating weight under Texas' special issues. Indeed, to the extent such evidence is constitutionally relevant, in that it bears on traditional sentencing concerns, it is equally relevant to the special issues in a mitigating fashion. If the jury believes the

crime is attributable to youthful impulsiveness, that factor militates against an affirmative answer to the deliberateness issue. Further, to the extent criminal conduct is attributable to any of these aspects, including poor judgment and impulsiveness, it also indicates that the defendant will not pose a future danger. The disabilities associated with youth are mitigating because a young person may not have had the opportunity, through life experience, to develop a mature judgment. Just as youth necessarily ends, so do any associated limitations, and society therefore expects young people to learn from their mistakes and their experience.

In the present case, no evidence was excluded from the jury's consideration. Johnson's evidence about his relative youth, as proffered at trial, was within the jury's effective reach, and defense counsel freely argued its mitigating relevance to the special issues. Consistent with the punishment-phase instructions, the jury was free to accept that Johnson's violent conduct was uncharacteristic, instead reflecting the influence of drugs and bad friends; that his background and character showed he would change when away from such influences; and that he had learned appropriately from his mistakes. The greater the role any proffered attributes of Johnson's youth played in his criminal conduct, the greater its mitigating relevance to the special issues submitted to the jury, particularly the second issue. There is no reasonable likelihood that the jury interpreted its instructions to unconstitutionally preclude it from considering and giving mitigating weight to Johnson's evidence when deciding the punishment issues. Because the jury was provided with a vehicle by which to give mitigating effect to Johnson's evidence, he was afforded the individualized sentencing guaranteed by the eighth amendment. Beyond this, he merely quarrels with how Texas guided that consideration--a claim that does not provide a basis for reversal under the eighth amendment.

ARGUMENT

I. THE COMPETING COMMANDS OF THE EIGHTH AMENDMENT ARE RECONCILED BY DISTINGUISHING RULES THAT GOVERN WHAT THE JURY MUST BE PERMITTED TO CONSIDER AND RULES THAT GOVERN HOW THE STATE MAY GUIDE THAT CONSIDERATION.

The dual requirements of the eighth amendment that govern administration of capital punishment are easy to identify but difficult to reconcile. First, a state's capital sentencing scheme must suitably direct and limit a sentencing jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); see also *Furman v. Georgia*, 408 U.S. 238 (1972). Second, "consideration of the character and record of the individual offender and the circumstances of the particular offense [is] a constitutionally indispensable part" of the capital sentencing process. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (joint opinion); see also *Lockett v. Ohio*, 438 U.S. at 604. Writing for the *Lockett* plurality in 1978, Chief Justice Burger stated:

> The signals from this Court have not . . . always been easy to decipher. The States now deserve the clearest guidance that the Court can provide; we have an obligation to reconcile previously differing views in order to provide that guidance."

id. at 602. Fifteen years later, the states, no less than this Court, "struggl[e] to harmonize [the] two competing commandments of the Eighth Amendment." *Graham v. Collins*, ___ U.S. ___, 113 S. Ct. 892, 898 (1993). The burden of compliance with these commands, however, falls squarely upon the states. Concomitantly, only the states bear the significant costs associated with any misinterpretation of the constitutionally permissible ways in which the competing mandates may be accommodated and reconciled.

Johnson claims that Texas' special sentencing issues were unconstitutionally applied in his case because they prevented the jury from giving adequate mitigating effect to evidence of his relative youth of nineteen years at the time of the offense. In this case, the Court should reaffirm that the states may, in promoting the rational administration of capital punishment, structure sentencer consideration of mitigating evidence so long as they do not "limi[t] the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all." *McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring). Such a rule would provide guidance to the states and to reviewing state and federal courts by meaningfully reconciling the competing constitutional mandates. In addition, it would continue to afford the states "their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990). Finally, with one exception, it would harmonize all of this Court's decisions respecting the requirement of sentencer consideration of mitigating evidence--including *Penry v. Lynaugh*, 492 U.S. 302 (1989), its precursors, and its successors. That sole exception is the sweeping and expansive construction of *Penry* advocated by Johnson and almost every death-sentenced capital murderer in Texas who seeks to overturn his or her sentence. To the extent that *Penry* lends itself to such an interpretation, it is incompatible

with the body of the Court's eighth amendment jurisprudence and should be rejected categorically.[13]

A. The states are allowed wide latitude in guiding how the jury may consider mitigating evidence.

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Court held that then-existing death penalty statutes violated the eighth and fourteenth amendments. Of the five-justice majority, the three justices who were unwilling to hold capital punishment *per se* unconstitutional found that standardless sentencing discretion created a risk of discriminatory application, *id.* at 250 (Douglas, J., concurring), permitted the penalty to be wantonly and freakishly imposed, *id.* at 310 (Stewart, J., concurring), and provided no meaningful basis to distinguish the few cases in which the death penalty was imposed from the many in which it was not, *id.* at 313 (White, J., concurring). To comply with the mandate of *Furman*, a state must, at a minimum, "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more serious sentence on the defendant compared to others found guilty of murder."

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[13] The Court in *Graham v. Collins* noted that it did not construe *Penry* so broadly, because such a construction is incompatible with Penry's own holding that it did not announce a "new rule" of law. *Id.*, ___ U.S. at ___, 113 S. Ct. at 901. The rule of *Penry* is the holding that is consistent with *Teague v. Lane*, 489 U.S. 288 (1989), regardless whether that rule is applied to cases on direct or collateral review.

The *Graham* Court also declined to "read *Penry* as effecting a sea change in this Court's view of the constitutionality of the former Texas death penalty statute; it does *not* broadly suggest the invalidity of the special issues framework." *Graham v. Collins*, ___ U.S. at ___, 113 S. Ct. at 901 (emphasis in original). To the extent this statement is *dicta*, it should be made a holding in the present case. Further, assuming *arguendo* that an expansive interpretation of *Penry* is binding under the doctrine of *stare decisis*, that broad interpretation should be overruled expressly.

Zant v. Stephens, 462 U.S. 862, 877 (1983). The fact that narrowing has been accomplished does not mean, however, that the state has no interest in promoting rationality and predictability in capital sentencing. Rather, "[s]tates are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde v. California*, 494 U.S. at 377, quoting *Franklin v. Lynaugh*, 487 U.S. at 181.

There is, accordingly, more than one way in which the eighth amendment may be satisfied. While a capital sentencing scheme may not be applied to preclude the sentencer from considering relevant mitigating evidence, the states remain free to guide that consideration. This latitude is grounded in considerations of federalism.

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.

Schad v. Arizona, 501 U.S. ___, ___, 111 S. Ct. 2491, 2500 (1991) (citation omitted); see also *Engle v. Isaac*, 456 U.S. 107, 128 (1982) ("The states possess primary authority for defining and enforcing the criminal law."). In guiding capital sentencing discretion, the state, "representing organized society," identifies the factors that it "deems particularly relevant to the sentencing decision." *Gregg v. Georgia*, 428 U.S. at 192 (joint opinion). State legislatures are best situated to understand the factors that its citizens deem significant and, concomitantly, to formulate sentencing procedures that incorporate and reflect those concerns. See *Skipper v. North Carolina*, 476 U.S. 1, 15 (1986) (Powell, J., joined by the Chief Justice and Rehnquist, J, concurring in judgment). Likewise, because each state has had

its own unique experience in the administration of capital punishment, state legislatures have responded to the mandate of *Furman* in a variety of ways. "The fact that other States have enacted different forms of death penalty statutes which also satisfy constitutional requirements casts no doubt on Pennsylvania's choice. Within the constitutional limits defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder will be punished." *Blystone v. Pennsylvania*, 494 U.S. at 309.

The Court has recognized that the state "need not grant the jury the choice to make the sentencing decision according to its own whims or caprice." *Saffle v. Parks*, 494 U.S. at 493; see also *Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("it is of vital importance . . . that any decision to impose the death sentence be, and appear to be based on reason rather than caprice or emotion"). Indeed, it was on this basis that the Court twice held it permissible to instruct the jury that its verdict may not be founded on feelings of sympathy. *Saffle v. Parks*, 494 U.S. at 492; *California v. Brown*, 479 U.S. 538, 542 (1987). In rejecting Parks' claim that such instruction prevented the jury from giving effect to his evidence, because the evidence tended to evoke sympathy, the Court reasoned that: "[t]his argument misapprehends the distinction between allowing the jury to consider mitigating evidence and guiding their consideration." *Saffle v. Parks*, 494 U.S. at 492. "The objectives of fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord in a juror." *Id.* at 495.

Likewise, the Court has approved a variety of state-imposed limitations on *how* the sentencer may give effect to mitigating evidence. The state may place upon the defendant the burden of proof and persuasion on the ultimate sentencing decision. Arizona's capital sentencing scheme, for example, did

not allow the sentencing judge to impose a life sentence unless the defendant established by a preponderance of the evidence the existence of mitigating factors "sufficiently substantial to call for leniency." *Walton v. Arizona*, 497 U.S. 639, ____, 110 S. Ct. 3047, 3055 (1990).[14] Additionally, a capital defendant is not constitutionally entitled to an "independent" vehicle by which the jury can measure her culpability and opt against the death penalty on that basis. Rather, once constitutionally mandated narrowing is accomplished, the state may *require* the sentencer to impose the death penalty unless the defendant proves the existence of a mitigating factor. *Blystone v. Pennsylvania*, 494 U.S. at 306-09 & n.4.

The latitude reflected by this line of cases is particularly warranted in this context. Compliance with the two general requirements of the eighth amendment, which are at the very least in tension, invariably subjects the state's capital-sentencing scheme to challenge as providing either *too much* discretion to impose the death penalty or *too little* discretion to decline to impose it. With increasing frequency, death sentences are simultaneously attacked on both grounds. *E.g.*, *Earhart v. Texas*, No. 92-8105 (pending on petition for writ of certiorari); *Walton v. Arizona*, 497 U.S. at ___, 110 S. Ct. at 3055-58.

Even where a defendant's evidence plainly possesses mitigating relevance to the sentencing inquiries provided by the

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[14] Johnson argues that such limitations merely require "jurors to confirm that evidence of a particular mitigating circumstance is in fact substantial before they proceed to the essentially moral judgment of whether it lessens the defendant's culpability and thus makes death an inappropriate sentence." Petitioner's Brief at 20. No such dichotomy exists, however. In *Walton*, for example, it is the sentencer's determination that mitigating factors are or are not substantial that represents its moral judgment about the defendant and his conduct. *Id.*, 497 U.S. at ___, 110 S. Ct. at 3051-53. In Texas, similarly, the jury's moral judgment is made in weighing the evidence and deciding whether a reasonable doubt exists on any special issue.

state, it routinely is asserted that the jury could not give *enough* mitigating effect to his evidence. *E.g.*, *Blystone v. Pennsylvania*, 494 U.S. at 308 (claiming that modifiers used in enumerated mitigating factors--such as the defendant acting under "extreme" duress or being "substantially" impaired from appreciating the consequences of his conduct--precluded the jury from considering lesser degrees of duress or impairment); *Walton v. Arizona*, 497 U.S. at ___, 110 S. Ct. at 3055-56 (claiming, *inter alia*, that defendant's burden of proving, by a preponderance of the evidence, mitigating factors sufficiently substantial for leniency, unconstitutionally precluded the sentencing judge from giving effect to mitigating evidence). However, because virtually every objective sentencing criterion adopted to "achieve a more rational and equitable administration of the death penalty" limits *how* the sentencer may give effect to mitigating evidence, the Court has recognized, and should continue to recognize, the "simple and logical difference between rules that govern what factors the jury must be permitted to consider in making the sentencing decision, and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision."[15] *Saffle v. Parks*, 494 U.S. at 490. The eighth amendment guarantee of individualized sentencing is protected by the former; the latter remains the province of the states.

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[15] This distinction is also reflected in cases pertaining to aggravating factors that are used in balancing states. Once the state has performed the constitutional minimum of narrowing, the Court has focused on *what* the jury was permitted to weigh. Where the sentencer's reliance on a vague aggravating factor impermissibly adds to the factors the sentencer may weigh against mitigation, the eighth amendment is violated. *E.g.*, *Stringer v. Black*, ___ U.S. ___, ___, 112 S. Ct. 1130, 1137 (1992). Where the evidence could have been weighed by the sentencer in any event, and the vague factor is not necessary to accomplish narrowing, there is no eighth amendment violation. *Zant v. Stephens*, 462 U.S. at 890.

B. The eighth amendment governs what mitigating evidence the sentencer must be permitted to consider.

1. Individualized sentencing is intended to further, rather than undermine, rationality in capital sentencing.

The Court in *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (joint opinion), provided three explanations for the eighth amendment requirement of individualized sentencing in capital cases. First, legislative enactments reflected that complete elimination of individualized sentencing would mark a departure from contemporary standards respecting administration of capital punishment. Prior to *Furman*, most states had eschewed mandatory death penalty statutes; and, even in the wake of *Furman*, the vast majority of the states did not abandon individualized sentencing but, rather, adopted some form of "guided discretion" sentencing scheme. *Id.*, 428 U.S. at 288-301.

Second, individualized sentencing furthers *Furman*'s requirement that states adopt capital-sentencing schemes that reduce the risk of arbitrary and capricious imposition of the death penalty. Given the inherently moral nature of a decision whether to impose the death penalty, juries necessarily will exercise a measure of discretion when they make that decision. A statute that makes the death penalty automatic upon a defendant's conviction of an aggravated murder merely shifts unbridled discretion from the punishment phase to the guilt-innocence phase of the trial. *Woodson*, 428 U.S. at 302-03. Far from guiding the jury's exercise of sentencing discretion, such a scheme is likely to promote arbitrariness in the sentencing decision. *Id.* at 303; *Roberts (Stanislaus) v. Louisiana*, 428

U.S. 325, 334-35 (1976); see also *Hopper v. Evans*, 456 U.S. 605, 611 (1982). Additionally, under a scheme that absolutely prevents the jury from considering aspects of the individual offender and offense, the jury may be tempted to exercise its inevitable discretion based on irrational or impermissible generalizations, including class and race. *Graham v. Collins*, ___ U.S. ___, 113 S. Ct. at 907 (Thomas, J., concurring).

The third rationale for individualized sentencing is "the fundamental respect for humanity underlying the Eighth Amendment". *Woodson*, 428 U.S. at 304. A scheme that permits *no* individualized sentencing "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Id.* Thus, while provision of individualized sentencing remains a policy choice in non-capital cases, *Harmelin v. Michigan*, 501 U.S. ___, ___, 111 S. Ct. 2680, 2701-02 (1991), it is a necessary component of a constitutional capital-sentencing scheme.

Although respect for the unique humanity of the defendant may serve to explain why society's traditional sentencing concerns are weightier where death is a possible penalty--that is, why the state may not eliminate individualized sentencing--it does not itself provide a rational sentencing criterion. No capital defendant is any more or less a "uniquely individual human being" than any other capital defendant. To hold that a capital sentencing decision must be permitted to hinge on the vagaries of a jury's respect for the defendant's unique humanity, or for qualities that are somehow redeeming, would require a return to the unfettered discretion condemned in *Furman*. At the very least, such a decision would be, like one based upon the individual sensitivities of individual jurors, "very difficult" to reconcile with the Court's "long-standing recognition that, above all, capital sentencing must be reliable, accurate, and non-arbitrary." *Saffle v. Parks*, 494 U.S. at 493. This rationale, thus, serves only to explain why there appears to be no definition

of capital murder that is sufficiently aggravated to justify elimination of individualized sentencing. *E.g.*, *Sumner v. Shuman*, 483 U.S. 66 (1987) (murder committed while defendant serving sentence of life without possibility of parole); *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977) (per curiam) (murder of a policeman); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976) (joint opinion) (first degree murder).

In explaining why aspects of a capital defendant's background and character and the circumstances of the crime have relevance at sentencing, the Court repeatedly has referred to society's basic rationales for the criminal law. In capital cases, as in non-capital cases, individualized sentencing serves society's basic interests in retribution (punishing the individual for his misdeeds), deterrence (preventing similar future conduct by the person convicted and others),[16] and rehabilitation (restoring the convict to a useful and productive place in society). See *Gregg v. Georgia*, 428 U.S. at 183-87 (joint opinion of Stewart, Powell, and Stevens, JJ.). These considerations, which as a matter of public policy led to a prevailing practice of individualized sentencing in non-capital cases, attain sufficient weight in the context of capital punishment that individualized sentencing is constitutionally required. *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (plurality opinion), citing *Williams v. New York*, 337 U.S. 241 (1949).

Future dangerousness, for example, is a constitutionally recognized sentencing consideration because it corresponds to the rehabilitation, deterrence, and, and retribution rationales. See *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986); *Barefoot v. Estelle*, 463 U.S. 880, 897 (1983); *Boyde v. California*, 494

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16 Although general deterrence is a punishment rationale, the issue obviously is not part of an *individualized* sentencing decision. As Justice Stewart observed in *Gregg v. Georgia*, "[t]he value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures." *Id.*, 428 U.S. 153, 186 (1976) (opinion of Stewart, J., joined by Powell and Stevens, JJ.).

U.S. 370, 382 n.5 (1990). In deciding this issue, a jury effectively considers the defendant's prospects for rehabilitation to the point of living non-violently, whether a life sentence is sufficient to specifically deter the individual defendant from committing criminal acts of violence, and whether the defendant's criminal conduct is an aberration or the product of transitory conditions. The defendant's crime, culpability, background, and character all possess obvious relevance to this inquiry.

Likewise, culpability is constitutionally recognized because it relates to the retribution rationale for punishment. *Tison v. Arizona*, 481 U.S. 137, 149 (1987). In *Enmund v. Florida*, 458 U.S. 782, 800 (1982), the Court stated:

> [a]s for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability--what Enmund's intentions, expectations, and actions were. . . .

The question "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result" obviously and directly addresses this primary measure of culpability.

To the extent a defendant's culpability for the offense may be a function of proffered aspects of his character and background that are irrelevant to his intentions, expectations, and conduct at the time of the offense, it must be because the crime is to some degree attributable to those factors.

> [E]vidence about the defendant's background and character is relevant *because of the belief, long held by this society*, that defendants who commit

> criminal acts that are *attributable* to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. . . . Thus, the sentence imposed at the penalty phase should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.

California v. Brown, 479 U.S. at 545 (O'Connor, J., concurring) (first and second emphases added, third emphasis in original); *Penry v. Lynaugh*, 492 U.S. at 319. Likewise, the proffered factors must be ones that society traditionally has viewed as lessening a defendant's culpability or responsibility for his criminal conduct. Absent either element, the proffer of evidence merely constitutes an appeal to sympathy or an invitation to dispense mercy based on nothing more substantial, or rational, than the degree of respect the jury believes the defendant's unique humanity deserves. Nothing in the Court's precedent indicates that it intends or desires this effective return to unbridled discretion. Both transitory conditions to which the crime was attributable and factors proffered to show the crime was an aberration have mitigating relevance to the future dangerousness issue. See *Graham v. Collins*, ___ U.S. at ___, 113 S. Ct. at 902; *Boyde v. California*, 494 U.S. at 382 n.5 (evidence of positive character in the face of disadvantages may extenuate the gravity of the crime by showing it to be an aberration).

2. The rule of *Lockett* establishes that the state may not exclude constitutionally relevant evidence or prevent the sentencer from giving it any mitigating weight.

The rule of *Lockett v. Ohio* represents the Court's effort to reconcile *Furman*'s mandate that capital-sentencing procedures be tailored to reduce the risk of arbitrary and capricious imposition of the death penalty with the subsequent mandate of *Gregg* and its companion cases that capital-sentencing proceedings provide for consideration of the particular offense and offender. The plurality undertook to explain "which facets of an offender or his offense it deemed 'relevant' in capital sentencing [and] what degree of consideration of 'relevant facets' it would require". *Id.*, 438 U.S. at 604, quoting *Woodson v. North Carolina*, 428 U.S. at 304. It concluded:

> [T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett, 438 U.S. at 604 (emphasis in original). *Lockett* delineates *what* potentially mitigating evidence is constitutionally relevant at capital sentencing. *Id.* As a corollary, it requires that the state permit constitutionally relevant evidence to affect the sentencing decision in a mitigating fashion. *Id.* at 608. It does not, however, purport to dictate how the sentencer must

consider mitigating evidence. *Saffle v. Parks*, 494 U.S. at 490-91.

Applying the rule of *Lockett*, the Court has considered *whether*, not *how*, the jury could give mitigating effect to relevant evidence. *Saffle v. Parks*, 494 U.S. at 490. Potentially mitigating evidence about a defendant's background and character and the circumstances of the offense may not be excluded from the sentencing determination. *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (sentencing judge refused to consider, as a matter of law, defendant's non-statutory mitigating evidence and instructed jury to consider only enumerated mitigating factors); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (trial court refused to admit, as irrelevant, defendant's proffered evidence of good behavior and adjustment to life in prison); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (sentencing judge believed state law prohibited him from considering and weighing evidence of 16-year-old defendant's violent family history). Likewise, the state may not "limi[t] the inquiries to which is it relevant so severely that the evidence could not be part of the sentencing decision at all." *McKoy v. North Carolina*, 494 U.S. at 456 (Kennedy, J. concurring); see *Lockett v. Ohio*, 438 U.S. at 608 (virtually all mitigating aspects of the offender and her offense were irrelevant to the three narrow mitigating circumstances). These decisions do not stand for the proposition that evidence is constitutionally mitigating merely because the defendant proffers it. Rather, they reflect that only in the rarest of cases will evidence about a defendant's background, character, and crime have so little bearing on traditional concerns that it may be removed entirely from the sentencing decision.

While *Lockett* governs the mitigating factors the jury must be permitted to consider in making its sentencing decision, the Court never has promulgated "rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Saffle v. Parks*, 494 U.S. at 490. The Constitution does not require the states to provide every

conceivable vehicle by which the sentencer may "give effect" to the defendant's proffered evidence, *Boyde v. California*, 494 U.S. at 382-86 & n.5. Neither *Lockett* nor *Eddings* "establishes the weight which must be given to any particular mitigating evidence, or the manner in which it must be considered; they simply condemn any procedure in which such evidence *has no weight at all*." *Barclay v. Florida*, 463 U.S. 939, 961 n.2 (1983) (opinion of Stevens, J., joined by Powell, J., concurring in the judgment) (emphasis added); see also *Eddings v. Oklahoma*, 455 U.S. at 114-15 ("The sentencer . . . may determine the weight to be given to relevant mitigating evidence."). The state complies with the eighth amendment by providing *a fair vehicle* by which the sentencer may effectively consider relevant mitigating evidence.

For example, in *Boyde v. California*, the defendant claimed that evidence he won a dance contest in prison demonstrated an absence of future dangerousness--a factor that Boyde argued could not be given effect under California's death penalty statute. Nonetheless, Boyde presented this evidence as an aspect of his good character, and the Court held that the jury could give effect to such evidence insofar as it, like other good character evidence, demonstrated the crime to be an aberration from an otherwise good character. *Id.* at 383 n.5. The jury did not have what was arguably the most direct vehicle for giving mitigating effect to Boyde's evidence--a future dangerousness question--and could not have given independent mitigating effect to this evidence if it also believed that the evidence did not extenuate the gravity of Boyde's crime or show it to be an aberration. Nonetheless, the Court found no eighth amendment violation because the jury had *a fair vehicle* by which it could give effect to that evidence.

Penry v. Lynaugh, 492 U.S. 302 (1989), arguably departs from the Court's prior cases because the Court found a violation of *Lockett* despite the fact that constitutionally relevant evidence was not excluded from sentencer consideration as a matter of law--either by instruction to disregard or by complete

irrelevance to the state's sentencing inquiries. As the majority recognized, Penry's retardation was relevant in a mitigating fashion to the question whether he acted deliberately and with the reasonable expectation that death would result, because the proffered mitigating evidence reflected that retardation caused Penry to act impulsively. *Penry v. Lynaugh*, 492 U.S. at 322. Indeed, precisely to the extent Penry's crime was attributable to this aspect of his retardation, the evidence also militated against an affirmative answer to the first special issue because impulsive conduct is the antithesis of deliberate conduct.

Nonetheless, the other major mitigating force of Penry's evidence of retardation and childhood abuse was that, as a result, he could not learn from his mistakes. This aspect of his retardation was logically relevant to the second special issue, but *only* in an aggravating fashion. *Id.* at 323-24. Indeed, the *greater* the extent to which the capital murder was attributable to Penry's inability to learn from his mistakes, the stronger the aggravating weight of that evidence. The *Penry* Court assessed whether, not how, the jury could give mitigating effect to this aspect of Penry's evidence, and it concluded that the jury's inability to give it *any* mitigating effect violated the eighth amendment. To the extent the *Penry* holding reflects that the jury could give *no* mitigating effect to this significant aspect of his retardation, it is consistent with prior precedent. The Court should reaffirm this view of *Penry* and *Lockett* as the appropriate accommodation of the competing constitutional commands: while a defendant is entitled to proffer any character or background evidence for its relevance to valid sentencing concerns, the eighth amendment is violated only if evidence that is probative of a reduced culpability or an absence of future dangerousness cannot result in a sentence less than death under the sentencing inquiries provided by the state.

C. Texas reasonably guides sentencer discretion through special issues that incorporate traditional sentencing concerns.

As the Court expressly recognized in *Jurek v. Texas*, 428 U.S. 262, 269-74 (1976), Texas did not respond to *Furman* by enacting a capital sentencing statute with enumerated aggravating and mitigating circumstances. Rather, the Texas Legislature adopted special issues[17] to which a wide range of evidence, aggravating and mitigating, is relevant and admissible. A death sentence is imposed only after the jury unanimously finds, beyond a reasonable doubt, that all special issues submitted should be answered in the affirmative. For this reason, the cases are few in which a defendant's proffered evidence will be unable to affect the sentencing decision in a mitigating fashion. The Texas special issues are, thus, "significantly different" in nature and scope from the three mitigating circumstances at issue in *Lockett v. Ohio*, 438 U.S. at 612-13, which instead are similar to three of Florida's seven statutory mitigating factors. Compare *id.* (Appendix to Opinion of the Court),[18] with *Proffitt v. Florida*, 428 U.S. 242, 248 n.6 (1976).[19]

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[17] The full text of the special issues is set forth *supra* at page 2.

[18] The three mitigating circumstances provided by the Ohio statute were:

> (1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

The special issues "guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individualized offender before it can impose a sentence of death." *Jurek v. Texas*, 428 U.S. at 274. They do so in an eminently reasonable manner--by requiring the jury to express its moral judgment about the offense and the offender in a manner directly corresponding to society's concerns in the administration of the criminal law, rather than by attempting to delineate a few of the factors relevant to those concerns. The Texas special issue format generally and the future dangerousness issue specifically are not moral only in a "utilitarian" sense. See *Graham v. Collins*, ___ U.S. ___, 113

> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such a condition is insufficient to establish the defense of insanity.

Ohio Rev. Code Ann. § 2929.04(B) (1975).

[19] Florida's statutory mitigating circumstances included the following:

> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (c) The victim was a participant in the defendant's conduct or consented to it.
>
> * * *
>
> (e) The defendant acted under extreme duress or under the substantial domination of another person.

Fla. Stat. Ann. § 921.141(6) (Supp. 1976-77).

S. Ct. at 922 (dissenting opinion). Even the four dissenting justices in *Blystone* recognized as much.

> These questions require the jury to do more than find facts supporting a legislatively defined aggravating circumstance. Instead, by focusing on the deliberateness of the defendant's actions and his future dangerousness, the questions compel the jury to make a moral judgment about the severity of the crime and the defendant's culpability. The Texas statute directs the imposition of the death penalty only after the jury has decided that the defendant's actions were sufficiently egregious to warrant death.

Blystone v. Pennsylvania, 494 U.S. at 322 (dissenting opinion of Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.).

Except in atypical cases such as *Penry*, in which the defendant's crime is attributable to a uniquely severe permanent handicap that also shows she will continue to commit criminal acts of violence, any dichotomy between "looking forward" to assess future dangerousness and "looking back" to the defendant's culpability is of little import. The jury is not given a crystal ball so that it can "look forward" to see whether the defendant will pose a future danger. Rather, it is provided with evidence about the defendant's past--her background, her character, her record, and the circumstances and gravity of her crime--and its decision is based upon such factors. The special issues thus permit the jury to express a reasoned and moral response to evidence about the defendant, her culpability, and her capacity for rehabilitation.

Indeed, the Court in *Adams v. Texas*, 448 U.S. 38 (1980), expressly recognized that jurors retain sufficient

discretion under the special issue format that their general views on capital punishment can permissibly influence the sentencing decision.

> [J]urors in Texas must determine whether the evidence presented by the State convinces them beyond reasonable doubt that each of the three questions put to them must be answered in the affirmative. In doing so, they must consider both aggravating and mitigating circumstances, whether appearing in the evidence presented at the trial on guilt or innocence or during the sentencing proceedings. Jurors will characteristically know that affirmative answers to the questions will result in automatic imposition of the death penalty. . . . In essence, Texas juries must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. *Jurek v. Texas*, 428 U.S. 262, 271 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) This procedure is not an exact science, and the jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths.

Adams v. Texas, 448 U.S. at 46. The same rationale also serves to explain why, consistent with the special issues and jury instructions, the jury's view about the propriety of the death penalty in a *particular* case can affect its answers to the special issues in the permissible sense acknowledged in *Adams*. Just as

the jury in a balancing state "gives effect" to mitigating evidence by considering and weighing it when determining the ultimate sentencing issues, a Texas capital jury "gives effect" to mitigating evidence by determining whether, in light of all the evidence, the special issues should be answered "yes" beyond a reasonable doubt. Under the Texas scheme, therefore, any evidence that possesses mitigating relevance to a single special issue can, if credited and accorded sufficient weight by the sentencer, raise a reasonable doubt. Consistent with constitutional requirements, all such evidence is permitted to affect the sentencing decision in a mitigating fashion and is within the jury's "effective reach." *Graham v. Collins*, ___ U.S. at ___, 113 S. Ct. at 902.

II. THE SPECIAL ISSUES PERMITTED THE JURY TO GIVE MITIGATING EFFECT TO ALL SUBSTANTIAL PROFFERED ASPECTS OF JOHNSON'S YOUTH, IN COMPLIANCE WITH THE EIGHTH AMENDMENT.

All members of this Court agree that under the Texas capital-sentencing issues, youth is a factor that the sentencer may view as mitigating and that can affect the sentencing decision in a mitigating fashion. *Graham v. Collins*, ___ U.S. at ___, ___, 113 S. Ct. at 902, 925. Johnson's claim, thus, is merely that the instructions and special issues limited *how* the jury could give effect to evidence pertaining to his relative youth. As discussed *supra* at 20, this allegation does not state a claim for relief under the eighth amendment.

In the alternative, because Johnson's claim is not that evidence was excluded from the sentencing process, the appropriate standard for review is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a

way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. at 380.

> Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition. This "reasonable likelihood" standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent upon how a single hypothetical "reasonable" juror could or might have interpreted the instruction.

Id.

Application of this standard indulges a presumption that the jury will not choose, from among plausible interpretations of the charge, an interpretation that will transform the presentation of mitigating evidence into "'a virtual charade'"--unless the text of the instructions compels it to do so. *Boyde*, 494 U.S. at 383-84, quoting *California v. Brown*, 479 U.S. at 542.

> [J]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in light of all that has taken place at trial likely to prevail over technical hairsplitting.

Boyde v. California, 494 U.S. at 380-81. Further, in assessing whether there is a reasonable likelihood that a particular jury felt constrained by its instructions to ignore mitigating evidence, the evidence should be assessed as it actually was proffered at trial.[20] *Boyde*, 494 U.S. at 382 n.5. Any other approach would allow the mere *possibility* of inhibition to provide a basis for overturning a death sentence--a result the Court expressly sought to avoid when it adopted this standard of review. *Id.* at 380. It also would permit death sentences to be overturned, not because the sentencer was precluded from giving mitigating effect to evidence proffered by the defendant as the basis for a sentence less than death, but because of mitigating inferences belatedly urged by the death-sentenced inmate as a basis for reversal.

Finally, application of the "reasonable likelihood" standard should take into account the inherently "moral" nature of the jury's decision. That is, where consideration of aggravating and mitigating evidence leads the sentencer to believe that a death sentence is appropriate, even the presence of twenty different vehicles by which the jury may "give effect" to mitigating evidence probably will not result in a life sentence. On the other hand, if the jury's weighing of mitigating and aggravating evidence persuades it that a life sentence is appropriate, a single vehicle by which the defendant's evidence can affect the sentencing decision in a mitigating fashion will be sufficient to allow it to do so. This is as true with respect to Texas' former special issue format as it is with respect to the capital-sentencing schemes adopted by other states. Because the special issues are the ultimate issues on the question of capital

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20 The Court refused to consider Boyde's argument that evidence he won a prison dance contest demonstrated an absence of future dangerousness because Boyde did not proffer the evidence for that purpose at trial. Rather, the evidence was proffered as an aspect of Boyde's good character, and the Court confined its review to the purpose for which it was proffered. *Boyde v. California*, 494 U.S. at 382 n.5.

punishment, the jury is "likely to weigh mitigating evidence as it formulates these answers in a manner similar to that employed by capital juries in 'pure balancing' States." *Franklin v. Lynaugh*, 487 U.S. at 182 n.12.

Penry preceded *Boyde* and, accordingly, did not purport to apply the "reasonable likelihood" standard. To the extent *Penry* indicates that a different inquiry is appropriate--whether "a reasonable juror *could well have believed* that there was no vehicle" for giving mitigating effect to relevant evidence--it has been expressly overruled. *Boyde v. California*, 494 U.S. at 379, quoting *Penry v. Lynaugh*, 492 U.S. at 326 (emphasis added by *Boyde* Court). Additional language in *Penry* also is inconsistent with the "reasonable likelihood" formulation. Rather than assessing whether the first and third special issues *permitted* the jury to give mitigating effect to Penry's evidence of retardation and childhood abuse, the Court appeared to engage in a form of sufficiency review. Regarding special issue one, the majority stated that "[a] rational juror . . . *could have concluded*" that Penry deliberately killed the deceased. *Penry v. Lynaugh*, 492 U.S. at 322 (emphasis added). Similarly, with respect to the third issue, it concluded that, if a juror believed Penry's evidence showed him to be less culpable, it "would not *necessarily* diminish the 'unreasonableness' of his conduct" in response to provocation, if any, by the deceased. *Id.* at 324 (emphasis added).

The Court should in this case make clear that the appropriate inquiry is not whether the defendant's evidence *necessarily would have* raised a reasonable doubt in the minds of jurors, but whether it was *capable* of raising a reasonable doubt on any of the punishment issues. The mere fact that the state adduces evidence that is constitutionally sufficient under the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), or that the defendant's evidence does not entitle him to a "no" answer as a matter of law, does not mean that the jury is precluded from

giving effect to the mitigation.[21] This formulation is equivalent to stating that the jury in a balancing state that provides for a life sentence if mitigating factors outweigh aggravating factors cannot "give effect" to the mitigating evidence unless it outweighs aggravation as a matter of law, or the fact that there are five aggravating factors precludes the sentencer from giving effect to a single mitigating circumstance. Rather, the jury's reasoned moral response is expressed through the weighing process itself.

Here, there is no reasonable likelihood that the jury interpreted the punishment-phase instructions to prohibit it from considering, weighing, or giving mitigating effect to Johnson's evidence of relative youth. The trial court instructed the jury that its answers to the following issues would determine Johnson's punishment:[22]

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[21] In performing sufficiency review, a court does not sit as a thirteenth juror, asking whether it believes the evidence was sufficient. *Jackson v. Virginia*, 443 U.S. at 318-19. To preserve the jury's role as "weigher of the evidence", the evidence is construed in the light most favorable to the government,with all conflicts resolved in favor of the verdict. *Id.* at 319. The fact that a rational jury could have chosen to give the defendant's evidence little weight, and might not have believed it at all, does not mean that it was required to do so. Thus, the Court of Criminal Appeals' decisions when performing sufficiency review under *Jackson* do not support Johnson's claim that the special issues precluded the jury from giving effect to his mitigating evidence.

[22] The jury was expressly instructed that its answers to the special issues would determine Johnson's punishment:

> You are further instructed that if the jury returns affirmative or "yes" answers to all the Issues submitted, this Court shall sentence the Defendant to death. If the jury returns a negative or "no" answer to any Issue submitted, the Court shall sentence the Defendant to life in prison.[146]

> Was the conduct of the Defendant, Dorsie Lee Johnson, Jr., that caused the death of the deceased, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> * * *
>
> Is there a probability that the Defendant, Dorsie Lee Johnson, Jr., would commit criminal acts of violence that would constitute a continuing threat to society?

JA 148-49. In determining the answers to these issues, the jury was expressly authorized to consider, all of the evidence admitted at both phases of the trial, "whether aggravating or mitigating in nature". JA 147. Johnson's evidence of relative youth, as proffered, possessed mitigating relevance to the special issues. As in *Graham v. Collins*, the evidence was not placed beyond the "effective reach" of the jury, *id.* at ___, 113 S. Ct. at 902, and Johnson was thus afforded the individualized sentencing guaranteed by the eighth amendment.

No major mitigating aspect of youth, either generally or as shown by the evidence in Johnson's case specifically, falls outside the scope of the special issues. Johnson mentions as salient features of "youthfulness" a tendency toward impulsive conduct, susceptibility to influence, and struggle to establish one's own identity. As this Court observed, "'minors often lack the experience, perspective, and judgment' expected of adults. . . ." *Eddings v. Oklahoma*, 455 U.S. at 115, quoting *Bellotti v. Baird*, 443 U.S. 662, 635 (1979).

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[146] JA 146.

Any tendency of a young capital murderer to act impulsively is relevant in a mitigating fashion to the question whether his conduct was committed deliberately and with the reasonable expectation that the death of the deceased would result. Indeed, impulsive conduct is the antithesis of deliberate conduct. Further, because special issue one also requires the jury to examine whether the defendant reasonably expected that his actions would result in death, the jury is permitted to consider, as mitigating, evidence showing that the defendant did not appreciate the meaning and consequences of his conduct. Consistent with the Constitution, special issue one requires that there be a nexus between these qualities and the crime itself. If a youthful defendant tends to act impulsively because of his age, but the crime was deliberate rather than impulsive, that aspect of youth does not reflect a reduced culpability. While such evidence may very well play to the sympathies or emotions of jurors, it does not reflect a reduced culpability because the crime is not fairly attributable to any tendency toward impulsive behavior. *Penry v. Lynaugh*, 492 U.S. at 319.

Here, the jury's affirmative answer to special issue number one does not indicate that the jury was precluded from giving mitigating effect to these aspects of Johnson's youth.[23] Rather, it merely reflects that the jury either did not credit the evidence or gave it insufficient weight to raise even a reasonable doubt on that issue.[24] Indeed, given the calculated and

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[23] Any impulsive behavior and lack of awareness by Johnson was proffered in connection with his claimed use of drugs prior to the offense. R. XV 385-86, JA 47-48.

[24] The prosecutor did not argue that Johnson's evidence was irrelevant to the deliberateness question but, rather, that the evidence was self-serving and less than credible. "You see, he then told the police officers what he did. If he is acting under diminished capacity, he wouldn't be able to calculate and plan and do everything. But he told it with great particularity about what he did and how he did it and why he did it and who was there and why he -- what he did and said to them. . . . He killed him on purpose, on purpose. No diminished capacity. He deliberately did it." R. XV 469, JA 88.

premeditated nature of the crime, the fact that Johnson executed the deceased pursuant to a plan to eliminate witnesses, and his amendment of the plan while waiting for a customer to leave (that is, he decided to ask for a gallon jug of orange juice because there was none on the shelves), the jury quite rationally rejected any suggestion that the crime was attributable to youthful impulsiveness. Beyond this, any tendency of Johnson to act impulsively because of his relative youth has no constitutional relevance to his culpability for commission of capital murder.

The foregoing qualities, along with susceptibility to influence and immature judgment, can also be given mitigating effect under the second special issue. It is the malleability of young people that indicates an amenability to positive change--an aspect of youthfulness that possesses obvious mitigating relevance to the future dangerousness question. Further, because a young person's lack of experience may make him vulnerable to negative influences, his conduct may reflect those influences rather than his character. Accordingly, where the criminal conduct of a juvenile is attributable to such influence, the conduct will not bear on his character and propensities in the same that an older person's conduct generally does.

Johnson also asserts that, during jury selection, the prosecutor encouraged jurors to blur the line between intentional and deliberate conduct. The record reflects, however, that the prosecutor emphasized that the two inquiries were different and that the first special issue could not automatically be answered "yes" based upon a finding of intentional conduct at the guilt-innocence phase. *E.g.*, R. IX 3512-13; 3707-09; 3665-66; XI 4600-01. The prosecutor used the following example as an illustration: "[T]he Legislators intended for there to be two separate thought processes; therefore, they deliberately used two different words." R. XI 4601. In any event, given the premeditated nature of Johnson's own crime, the examples he cites, Petitioner's Brief at 4 n.1, have no bearing on the question before the Court.

In addition, precisely to the extent criminal conduct is *attributable* to a transitory condition, or to an extraordinary circumstance or stress, that evidence indicates a lack of future dangerousness. Such mitigating relevance is both obvious and logical. Indeed, much of the evidence mentioned by the Court of Criminal Appeals in *Jurek v. State*, 522 S.W.2d 934 (Tex. Crim. App. 1975), falls within this category.

> In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand.

Id. at 939-40; see also *Jurek v. Texas*, 428 U.S. at 266-68 (mitigating factors included Jurek's relative youth of twenty-two years, the fact that he had been drinking prior to the offense, and good deeds reflecting a good character). Channeling sentencer consideration of such evidence through the future dangerousness inquiry appropriately guides the jury's consideration of evidence

offered in mitigation without limiting what factors the sentencer may consider as mitigating.[25]

Recognition that juvenile offenders may lack the judgment expected of adults does not explain why youthful offenders are viewed as less culpable for that reason. Adult criminals who are not amenable to rehabilitation clearly exercise a judgment that is unlike that exercised by law-abiding citizens. That *difference* in judgment, which equally may be termed a lack of the judgment society expects of adults, is anything but mitigating--despite the efforts of some capital murderers to claim that being a sociopath is mitigating. *E.g.*, *Demouchette v. Collins*, No. 92-5914, *cert. denied*, ___ U.S. ___, 113 S. Ct. 27 (1992); see *Graham v. Collins*, ___ U.S. at ___, 113 S. Ct. at 915 (Thomas, J., concurring). Rather, the defendant's prior criminal conduct may properly be treated as aggravating evidence at sentencing. See 28 U.S.C. § 944(i) (directing United States Sentencing Commission to ensure that defendants with prior convictions would received enhanced punishments).

What is mitigating about youth, other then a tendency toward impulsive behavior that is fully encompassed by the deliberateness inquiry, is that young people may not have had the life experience that provides a basis for the exercise of appropriate judgment.[26]

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[25] The fact that "future dangerousness" is an aggravating factor in Oklahoma does not mean that *Eddings* stands for the proposition that the second special issue is inadequate to permit consideration of mitigating evidence. Rather, the *Eddings* Court found eighth amendment error because the sentencing court expressly held that the law required it to disregard mitigating evidence. 455 U.S. at 112-13.

[26] Murder, of course, does not fall within a moral "gray" area. "It is . . . absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards." *Stanford v. Kentucky*, 492 U.S. 361, 374 (1989) (opinion of Scalia, J.,

> [Y]outh is mitigating because insufficient experience has not allowed judgment and self-control to fully develop, but the limitations attributable to youth are all necessarily transitory.

Graham v. Collins, 950 F.2d 1009, 1031 (5th Cir. 1992) (en banc). Youth is an inherently transitory "time and condition of life," *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (footnote omitted), and it necessarily follows that the disabilities of youth diminish and disappear with the passage of time.[27] Indeed, society expects young persons to mature as they age and

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joined by the Chief Justice and White and Kennedy, JJ.). This is particularly true with respect to murders committed for the purpose of witness elimination, such as the murder Johnson committed as a nineteen-year-old adult.

[27] See, *e.g.*, Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 U.C.S.A. L. Rev. 503, 508 & n.13, 538 (1984) (a child may have difficulty choosing among options, but an adult will not; children usually are not considered to be culpable because of their age, but this changes once the child becomes an adult); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. Rev. 821, 911 (1988) (the progression from child to adult in maturity and experiencing time is the same as the progression from children to adults in developing responsibility for making blameworthy choices); Alison R. Faltersack, *Stanford v. Kentucky, The Minimum Age for the Maximum Penalty--Death*, 23 J. Marshall L. Rev. 453, 466 & n.94 (1990) (many believe these disabilities of youth begin to transform into a self-reliant responsible age of adulthood during early adolescence, including the ability to plan for the future while becoming accountable to society); Lawrence A. Vanore, *The Decency of Capital Punishment for Minors; Contemporary Standards and the Dignity of Juveniles*, 61 Ind. L.J. 757, 779 (1986) (when minors become adults, they obtain more privileges as well as responsibility and culpability in matters of law); Glenn M. Bieler, *Death Be Not Proud: A Note on Juvenile Delinquent Punishment*, 7 N.Y.L. Sch. J. Hum. Rts. 179 (1990) (adolescence is the period of physical and psychological development from the onset of puberty to maturity, the transitional period between childhood and adulthood, and a stage of life lasting roughly from age 12 to age 19).

acquire life experience. Where the perspective provided by life experience probably will not lead to the responsible exercise of judgment that society expects of adults, and in the context of criminal law that it *demands* of adults, then the poor judgment and criminal conduct are not fairly attributable to the mitigating aspects of youth. Rather, they simply are attributable to the aggravating factor of bad character.

The record in this case demonstrates that the jury could give mitigating effect to evidence pertaining to Johnson's relative youth when it answered the second special issue, just as the Court of Criminal Appeals stated in *Jurek v. Texas*. All aspects of Johnson's youthfulness were proffered to show that his criminal conduct was inconsistent with his character, and it was this issue that was joined at the punishment phase. Johnson's father, Dorsie Johnson, Sr., described his son as a young man who, in "trying to step into manhood," associated with a bad crowd that involved him in the use of drugs. R. XV 360-62, JA 26-27. According to Mr. Johnson, it was the drugs that temporarily changed Johnson, altering his reasoning and control; when locked away from the drugs and the friends that influenced his lawless behavior, Johnson would act in conformity with his background and character. R. XV 360-63, JA 26-28. "[H]e got the background and what it takes to be a decent person. Now, he's had both sides of it. He knows what it takes to make him a different person." R. XV 362, JA 27.

Precisely to the extent that Johnson's criminal conduct was attributable to a lack of life experience and immature judgment, it equally indicated that he would not pose a future danger. His father's testimony, if believed by the jury, established that Johnson's experiences would provide the basis for responsible and mature exercise of judgment in the future. At the time of Johnson's capital-sentencing hearing, he plainly possessed life experiences and a perspective that most people will not attain in a lifetime. According to Mr. Johnson, his son told him, "'Daddy, I wish I could change it. I wish it never had happened. I wish I had listened more closely to what you said

and the way I was raised. I just got off, got into that stuff. It got the best of me.'" R. XV 365, JA 30. Had the jury credited evidence that Johnson's crime was attributable to the limitations of youth, it necessarily would have concluded that Johnson was capable of learning and did learn appropriately from his experiences; he would not in the future be susceptible to the drugs and negative influences of so-called friends that supposedly led to his violent conduct and, for that reason, would not pose a future danger.

Thus, all proffered aspects of Johnson's youth, which he now claims to reflect a reduced culpability beyond the scope of the special issues, possess mitigating relevance to the special issues. Consistent with the punishment-phase instructions, the jury could give mitigating effect to Johnson's proffered evidence in the precise manner advocated by defense counsel. As the punishment-phase summations of defense counsel and the prosecutor reflect, special issue number two ultimately required the jury to decide what kind of person Johnson really was. The prosecutor characterized Johnson as a "cold-blooded, heartless, premeditated murderer" who acted in conformity with a violent character and would continue to do so. R. XV 415-16, 420-24, JA 53-56. Defense counsel, on the other hand, urged that Johnson was a young man who was lured into the use of drugs by a bad crowd and whose violent conduct was inconsistent with his character. R. XV 449-51, 459, JA 73-75, 80-81. The prosecutor did not argue that Johnson's evidence was irrelevant to punishment generally or to the special issues specifically but, rather, maintained that it was not credible and did not accurately reflect Johnson's character.

The record in this case fully bears out the reasoning of the *en banc* court of appeals in *Graham v. Collins*:

> [W]hatever is mitigating about youth tends to lend support to a "no" answer to the second special issue, and its tendency to do so is essentially

> proportional to the degree to which the jury concludes such factors were influential in the defendant's criminal conduct. The greater the role such attributes of youth are found to have played in the defendant's criminal conduct, the stronger the inference that, as his youth passes, he will no longer be a danger to society.

950 F.2d at 1031. Here, the jury's decision as to which portrait of Johnson was accurate was an undeniably reasoned and moral one, and through the second special issue it could express its reasoned moral response to the evidence, including Johnson's mitigating evidence. Consistent with the eighth amendment, the sentencing decision was based upon the jury's consideration and weighing of particularized factors pertaining the individual offense and the individual offender.

Despite its recognition that a transitory condition such as youth possesses mitigating relevance to the future dangerousness issue, the *Graham* dissent nonetheless theorized that a jury might view youth as aggravating: "It is no answer to say youth is fleeting; it may not be fleeting enough, and a sufficiently young defendant may have his continuing youth considered under the second issue as aggravating, not mitigating." *Graham*, ___ U.S. at ___, 113 S. Ct. at 925. Johnson also argues that his youth is "dual-edged" because the jury had to consider a longer period of time during which he might be violent. This argument is rather like saying that a jury would treat a female capital murderer more harshly than her male counterpart, viewing her gender as an aggravating factor because women actuarially have a longer life expectancy than men and, hence, have more years within which to commit criminal acts of violence. There is no reasonable likelihood that a jury, particularly a jury inclined to leniency based upon temporary mitigating qualities of youth, would go to such lengths to treat the evidence as aggravating.

Even the prosecutor acting as an advocate did not urge the jury to ignore mitigating evidence for this reason. Rather, he argued that the unlikely possibility that Johnson might change twenty or forty years in the future (long after any disabilities of *youth* would have terminated) did not warrant a negative answer to the second special issue. R. XV 473, JA 91. The purported aggravating edge to youth, if any, is negligible, whether viewed in isolation or in comparison to the mitigating relevance of youth to the special issues. More significantly, the problem in *Penry* was not that the jury could choose whether to view certain evidence as aggravating or mitigating; rather, a substantial aspect of Penry's mental retardation and childhood abuse, an inability to learn from his mistakes, was not relevant to the first special issue and was relevant to the second special issue *only* as an aggravating factor. Here, in contrast, to the extent Johnson's evidence was relevant to traditional sentencing concerns and to his culpability, the jury was permitted to consider, weigh, and give mitigating effect to that evidence. The Constitution requires no more.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Criminal Appeals of Texas should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DORSIE LEE JOHNSON,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Texas Court of Criminal Appeals

PETITIONER'S BRIEF IN REPLY

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QUESTION PRESENTED

Did the Texas capital sentencing statute unconstitutionally preclude the jury from giving full mitigating effect to the petitioner's youthful age at the time of the offense?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ARGUMENT	4
A. RESPONDENT IGNORES THE CONSTITUTIONAL REQUIREMENT THAT THE JURY BE PERMITTED TO CONSIDER A TEENAGE DEFENDANT'S YOUTH AS IT BEARS ON HIS MORAL CULPABILITY	4
B. THE FORMER TEXAS SPECIAL ISSUES ARE SIMPLE AGGRAVATING CIRCUMSTANCES THAT REQUIRE A PURELY FACTUAL INQUIRY, AND NEITHER PERMIT NOR REQUIRE A JURY'S "REASONED MORAL RESPONSE" TO MITIGATING EVIDENCE OF YOUTH	5
1. *THE FIRST SPECIAL ISSUE*	6
2. *THE SECOND SPECIAL ISSUE*	9
C. *JUREK V. TEXAS* DOES NOT REQUIRE A RESULT DIFFERENT FROM THAT SOUGHT BY MR. JOHNSON	13
CONCLUSION	17

TABLE OF AUTHORITIES

CASES:	Page
Arave v. Creech, ___ U.S. ___, 52 Cr.L.Rep. 2373 (1993)	6
Beck v. Alabama, 447 U.S. 625 (1980)	18
Blystone v. Pennsylvania, 494 U.S. 299 (1990)	3
Boyd v. State, 811 S.W.2d 105 (Tex. Crim. App. 1991)	11
Boyde v. California, 494 U.S. 370 (1990)	3,9
Bullington v. Missouri, 451 U.S. 430 (1981)	11
Earhart v. State, 823 S.W.2d 607 (Tex. Crim. App. 1992)	12
Earhart v. Texas, No. 92-8105 (currently pending on petition for writ of certiorari)	13
Eddings v. Oklahoma, 455 U.S. 104 (1984)	5
Farris v. State, 819 S.W.2d 490 (Tex. Crim. App. 1990)	7
Franklin v. Lynaugh, 487 U.S. 164 (1988)	14
Furman v. Georgia, 408 U.S. 238 (1972)	*passim*
Godfrey v. Georgia, 446 U.S. 420 (1980)	14
Graham v. Collins, ___ U.S. ___, 113 S. Ct. 892 (1993)	3,12
Gregg v. Georgia, 428 U.S. 153 (1976)	14
Hernandez v. State, 819 S.W.2d 806 (Tex. Crim. App. 1991)	7
Hitchcock v. Dugger, 481 U.S. 393 (1987)	14
Jurek v. Texas, 428 U.S. 262 (1976)	*passim*
Knox v. State, 744 S.W.2d 53 (Tex. Crim. App. 1987)	11
Ex Parte Mathes, 830 S.W.2d 596 (Tex. Crim. App. 1992)	10
Morgan v. Illinois, ___ U.S. ___, 112 S. Ct. 2222 (1992)	5

Table of Authorities Continued

	Page
Nichols v. State, 754 S.W.2d 185 (Tex. Crim. App. 1988)	7
Penry v. Lynaugh, 492 U.S. 302 (1989)	9
Proffitt v. Florida, 428 U.S. 242 (1976)	14,15
Rector v. State, 738 S.W.2d 235 (Tex. Crim. App. 1986)	7
Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976)	18
Saffle v. Parks, 494 U.S. 484 (1990)	*passim*
Spivey v. Zant, 661 F.2d 464 (5th Cir., Unit B, 1981)	15
Stanford v. Kentucky, 492 U.S. 361 (1989)	5
Stringer v. Black, ___ U.S. ___, 112 S. Ct. 1130 (1992)	6
Washington v. Watkins, 655 F.2d 1346 (5th Cir., Unit A, 1981)	15
Woodson v. North Carolina, 428 U.S. 280 (1976)	*passim*
Zant v. Stephens, 462 U.S. 862 (1983)	6
Zimmerman v. State, No. 71,106 (Tex. Crim. App. April 7, 1993) slip op.	12

MISCELLANEOUS:

B. Cardozo, "What Medicine Can Do For The Law," *Law and Literature*, 70 (1931)	9

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PETITIONER'S BRIEF IN REPLY

INTRODUCTION

Respondent concedes the basic constitutional principles that govern this Court's resolution of Mr. Johnson's claim. First, Respondent agrees that youth is a powerful and constitutionally relevant mitigating circumstance. Respondent's Brief (hereinafter "R.B.") at 39-40. Accordingly, the jury may not be precluded from giving such evidence mitigating effect in arriving at its sentencing decision, nor may a State place such evidence "beyond the jury's effective reach by precluding the jury from giving it mitigating weight on the ultimate sentencing issues." R.B. at 11. Further, Respondent acknowledges that the Eighth Amendment requires a State to provide the sent-

encing jury with "*a fair vehicle* by which the sentencer may effectively consider relevant mitigating evidence." R.B. at 28 (emphasis in original).

What Respondent does not address—indeed, does not acknowledge—is the substantive inquiry this Court has identified as the "ultimate sentencing issue" in capital cases. This Court's decisions emphasize that the State must permit consideration of mitigating evidence in order to ensure a "reasoned moral response" to the offender and offense. Such a response must permit the sentencer to impose a sentence less than death based on the reduced culpability of the defendant. Because the State resolutely ignores the Eighth Amendment requirement that the jury's verdict reflect a "reasoned moral response" to the evidence, it fails to recognize the utter inadequacy of the bare "special issues" as applied to mitigating evidence of a teenage defendant's youth.

The Texas Court of Criminal Appeals has construed the first special issue to ask a question of *fact*: was the defendant's act "deliberate?" Thus interpreted, this narrow inquiry does not permit a jury to assess the moral significance of a defendant's limited judgment and immaturity, which may call for a sentence less than death. The "deliberateness" question has never been understood to encompass a broad examination of the defendant's background and character, or the circumstances which brought him to the threshold of his arguably "deliberate" act. As a result, under this Court's cases the first special issue as construed by the Texas courts is a patently inadequate "vehicle" for assessing a teenage defendant's moral culpability and the appropriateness of a death sentence for his crime.

Similarly, under Texas law the second special issue *also* asks a question of fact: "is there some probability that the defendant will continue to pose a threat to society?" Contrary to the State's baseless assertions, *see* R.B. at 31-

32, this inquiry has never been interpreted to encompass any "moral" dimension other than the utilitarian one identified by Justice Souter in *Graham v. Collins*, __ U.S. __, 113 S.Ct. 892, 922 (1993) (Souter, J., dissenting). It simply asks the jury to look into the future ("how far" into the future is left to individual whim) and to make a prediction about the defendant's likely behavior. This factual inquiry, much like the inquiry into the defendant's "deliberateness," does not permit an independent assessment of the defendant's moral culpability for the offense already committed. Worse, when applied to a youthful offender, it turns his youth against him as an aggravating factor. For these reasons, the second special issue also fails as a "vehicle" for the jury's "reasoned moral response."

The State's brief distorts the straightforward result required by this Court's cases since at least 1987, mistaking narrow holdings precluding capricious leniency for sweeping limitations on the consideration of mitigating evidence. This confusion is a direct result of the State's failure to understand that this Court has endorsed such appropriate restrictions only in the context of sentencing statutes that otherwise place *no* substantive limitations on the consideration of mitigating evidence.[1] Since acknowledging the centrality of the jury's "reasoned moral response" to evidence at the sentencing phase, this Court has never au-

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[1] *See Saffle v. Parks*, 494 U.S. 484 (1990); *Boyde v. California*, 494 U.S. 370 (1990); and *Blystone v. Pennsylvania*, 494 U.S. 299 (1990). The principle underlying these cases is that a capital sentencing scheme meets the constitutional demands of the Eighth Amendment if it does not preclude a sentencer from fully considering mitigating evidence and provides that sentencer with an adequate vehicle for expressing its reasoned moral response to all mitigating evidence presented. Each of these cases involved a capital sentencing scheme in which the jury was specifically instructed to consider all mitigating evidence presented and was empowered to express their reasoned moral response to that evidence in the form of a life sentence. In fact, it was these very qualities of the statutes at issue that led this Court to uphold them.

thorized a state to circumscribe the substantive inquiry into a defendant's moral culpability. In permitting States to structure "how" mitigating evidence may be considered, the Court has emphasized that such structuring must *foster*, not *inhibit*, the "reasoned moral response" that is the touchstone of capital sentencing. Texas' refusal to allow the jury to base its sentencing decision on a direct assessment of the defendant's moral culpability, substituting instead the cramped factual inquiries of the former "special issues," limits jury discretion in precisely this unconstitutional manner.

ARGUMENT

A. RESPONDENT IGNORES THE CONSTITUTIONAL REQUIREMENT THAT THE JURY BE PERMITTED TO CONSIDER A TEENAGE DEFENDANT'S YOUTH AS IT BEARS ON HIS MORAL CULPABILITY.

Respondent claims that the key constitutional question this Court must resolve is whether Mr. Johnson's jury was able to consider his youth *at all* in returning its answers to the "special issues" of the former Texas statute. *See, e.g.*, R.B. at 34, 39, 46. If so, Respondent contends, there can be no Eighth Amendment violation. *Id.* Respondent's argument misapprehends the course of this Court's decisions which hold that the constitutional mandate of individualized sentencing requires States to permit the sentencer fully to consider evidence of the defendant's *reduced moral culpability*. *See* Petitioner's Brief (hereinafter P.B.) at 12-18. Although a State is free to require the sentencer to consider mitigating evidence for *other* purposes—for example, to determine whether the defendant poses a "continuing threat" to society—it is not permitted to *substitute* such inquiries for the fundamental examination of a defendant's culpability and the appropriateness of a death sentence. The "traditional sentencing concerns" and "considerations . . . of public policy" which may counsel consideration of, for example, a defendant's likely future

dangerousness, *see* R.B. at 22-23, are secondary to the constitutional command that a capital sentencing jury determine whether the defendant's moral culpability justifies the imposition of death.

The question for this Court, then, is whether nineteen-year-old Dorsie Johnson's jury, in resolving the factual "special issues," would necessarily have been able to consider his youth *as it bore on his culpability*. A close examination of the "special issues" confirms that no such determination is permitted or required by the former Texas scheme.

Respondent fails to see the gap between the sentencer hearing evidence and whether, under state law, the sentencer is allowed to give that evidence effect. This distinction was expressly recognized with respect to youth and youthfulness in *Eddings v. Oklahoma*, 455 U.S. 104 (1984). *See also Stanford v. Kentucky*, 492 U.S. 361 (1989). It is also crucial to the reasoning in *Morgan v. Illinois*, ___ U.S. ___, 112 S.Ct. 2222 (1992), where this Court held that if even one member of a sentencing jury would not obey instructions that required consideration of mitigating evidence, then the jury as a whole was improperly impanelled.[2]

B. THE FORMER TEXAS SPECIAL ISSUES ARE SIMPLE AGGRAVATING CIRCUMSTANCES THAT REQUIRE A PURELY FACTUAL INQUIRY, AND NEITHER PERMIT NOR REQUIRE A JURY'S "REASONED MORAL RESPONSE" TO MITIGATING EVIDENCE OF YOUTH.

Respondent insists that the unadorned former "special issues," as presented to Mr. Johnson's jury, were adequate

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[2] Indeed, the *Morgan* Court taxed the dissent with overlooking the entire thrust of this Court's capital punishment teaching since 1976. 112 S.Ct. at 2233 ("rejection of the line of cases . . . developing the nature and role of mitigating evidence in the trial of capital offenses . . . is a view long rejected by this Court." (citations omitted)).

vehicles to effect the reasoned moral response required by the Eighth Amendment. R.B. at 39. The "special issues," however, require the jury only to resolve aggravating issues of *fact*; they do not permit consideration of whether Mr. Johnson's youth and unformed character at the time of the crime reduced his culpability such that death was a disproportionately harsh sentence.[3] Respondent fails to show that reasonable jurors would have inferred their constitutional obligation to assess Mr. Johnson's personal moral culpability from the straightforward *factual* determinations required by the two questions as narrowly construed under state law.

1. *THE FIRST SPECIAL ISSUE*

The first "special issue" did not permit consideration of Mr. Johnson's moral culpability for the crime. According to the Texas Court of Criminal Appeals, the first special issue is a tightly focused inquiry that does not authorize general consideration of a defendant's background or character. The unadorned term "deliberately," in the American legal tradition generally and particularly as construed by the Texas Court, is no more than a narrow question of fact regarding a defendant's *mens rea* at the moment of the underlying offense. *See, e.g., Arave v. Creech*, __ U.S. __, 52 Cr.L.Rep. 2373, 2375-2376 (1993) ("The law has long recognized that a defendant's state of mind is not a 'subjective' matter, but a *fact* to be inferred from the surrounding circumstances") (emphasis in original).[4]

[3] Whatever one calls the special issue questions, they *function* as "aggravating circumstances" because they are necessary prerequisite findings that "circumscribe the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 878 (1983). *See also Stringer v. Black*, ___ U.S. ___, 112 S.Ct. 1130 (1992).

[4] In *Creech*, this Court considered the constitutionality of the limiting construction the Idaho Supreme Court had placed on the aggravating circumstance of "utter disregard for human life," which defined that circumstance as referring to a "cold-blooded," "callous," and "pitiless" killer. The Court concluded that these terms did not equate to the *mens rea* concept of premeditation, but rather (through the Idaho Court's limiting construction) referred to a mental state separate from *mens rea*. Texas, of course, chose to incorporate an actual variety of *mens rea*, "deliberateness," in its first "special issue."

The Court of Criminal Appeals has repeatedly emphasized this firm limitation on the scope of "deliberateness" under state law. The Texas Court's authoritative view is reflected in its cases assessing whether the State presented sufficient proof that the defendant acted "deliberately:"

> [T]he common understanding of the term "deliberately" in a capital murder context is "something more than intentionally, . . . [but] less than premeditation, . . . [representing] a conscious decision—greater than mere will—to cause the death of the victim."

Farris v. State, 819 S.W.2d 490, 497 (Tex. Crim. App. 1990) (quoting *Nichols v. State*, 754 S.W.2d 185, 201 (Tex. Crim. App. 1988). *Accord Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991).[5] Thus defined as a mental state sandwiched somewhere in the narrow conceptual space between "intent" and "premeditation," the Texas standard for "deliberateness" requires no searching inquiry into how the defendant's background and character might have influenced his participation in the arguably "deliberate" act. The Eighth Amendment, however, requires precisely such consideration before death may be imposed.

In addition to the Texas Court's formal "definition" of "deliberateness," its *explication* of the term also demonstrates that the jury's affirmative answer in this case did not necessarily reflect a reasoned moral response to Mr.

[5] The Court of Criminal Appeals has long and consistently held, however, that the sentencing phase jury charge in a capital trial need not define "deliberately." *See, e.g., Rector v. State*, 738 S.W.2d 235, 244 (Tex. Crim. App. 1986).

Johnson's youth. When assaying the sufficiency of the evidence of "deliberate" conduct, the court below invariably refers to the same facts underlying the crime which support the inference that it was "intentional"—the standard for *guilt* of capital murder under Texas law.[6] Respondent cannot cite a single case in which the Texas Court has ever indicated that a defendant's moral culpability is relevant to the first special issue. Instead, applying its narrow *mens rea* interpretation of the first "special issue," the court below has simply proceeded mechanically from the finding that the killing was "intentional" to the conclusion that it was also "deliberate." That court, by refusing to require further instruction, plainly understands Texas juries to undertake a similar limited inquiry without engaging in a broad examination of the defendant's moral culpability as reflected by the unique circumstances of his character and background.

That "deliberateness" has no special, broad meaning in Texas, moreover, is consistent with the history of Anglo-American criminal law. Our tradition has long recognized that such terms as "intentional," "deliberate," and "premeditated" do not incorporate richly textured portraits of a defendant's character and background but instead indicate the simple presence or absence of a given state of mind toward a desired end. Indeed, the distinctions among such terms as "intentional" and "deliberate" have proved elusive even upon careful study. As Judge (later Justice) Cardozo remarked after concluding that the "distinction is much too vague to be continued in our law:"

> There can be no intent unless there is a choice, yet . . . the choice without more is enough to justify the inference that the intent was deliberate and premeditated. . . . The present distinction [between intent and deliberation] is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its obscure and mystifying phraseology, scores of men have gone to their death.

[6] *See* Brief for Petitioner at 29, n.19.

Cardozo, "What Medicine Can Do For The Law," reprinted in *Law and Literature*, 70, 99-101 (1931).

Contrary to Respondent's wishful thinking, the dispositive inquiry for this Court is not how some hypothetical "deliberateness" inquiry might afford a jury a vehicle for the full consideration of mitigating evidence. The question is whether *Texas*' former "deliberateness" question, as construed by *Texas*' highest court and as understood by a reasonable juror without additional instructions, *did* provide such a vehicle. This Court has already settled the issue in *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989): "[p]ersonal culpability is not solely a function of a defendant's capacity to act deliberately."

The foregoing discussion demonstrates that the first special issue provided an inadequate vehicle for the consideration of Mr. Johnson's mitigating evidence of youth as it bore on his moral culpability. There thus exists, *at a minimum*, a "reasonable likelihood" that Mr. Johnson's jury interpreted the first "special issue" to preclude a reasoned moral response to his evidence calling for a sentence less than death. *See Boyde v. California*, 494 U.S. 370, 380 (1990).

2. *THE SECOND SPECIAL ISSUE*

Respondent makes the remarkable assertion that "any dichotomy between 'looking forward' to assess future dangerousness and 'looking back' to the defendant's culpability is of little import." R.B. at 32. On the contrary; this

Court's cases confirm that this distinction is *decisive* in assessing the constitutionality of the second "special issue." Precisely because it focuses the jury's attention exclusively on the defendant's likely future behavior, and away from the extent to which his mitigating evidence reduces his culpability for the present offense, the second question is patently inadequate as applied to evidence of youth.

The Texas Court of Criminal Appeals has construed the former second "special issue" precisely as it has the first—as a narrow factual inquiry, which operates as neither invitation nor command to weigh the defendant's character and background in determining whether a death sentence was an appropriate "reasoned moral response" to his personal culpability for the offense. By its very terms, the second special issue considers only the possibility of future violent conduct by the defendant. Respondent appears to suggest that this inquiry somehow assesses the defendant's moral culpability for the past offense, rather than simply asking whether he may behave in a certain manner in the future. R.B. at 32. Respondent's position is belied by the plain facial meaning of the "continuing threat" special issue as well as the Texas Court of Criminal Appeals' consistent interpretation of that query.

The wholly *factual* character of the narrow prediction of "future dangerousness" under state law is well illustrated by *Ex Parte Mathes*, 830 S.W.2d 596 (Tex. Crim. App. 1992). Mathes committed a double murder and was convicted of capital murder for the death of one victim. The jury, however, returned a negative answer to the second special issue, requiring a life sentence. The State then sought to prosecute Mathes for the death of the second victim, and to obtain the death penalty in connection with that killing. The Court of Criminal Appeals held that collateral estoppel barred such a prosecution:

> Whether there is a probability that a defendant found guilty of capital murder would constitute a continuing threat to society *is an issue of ultimate fact*, the resolution of which in a bifurcated proceeding is determinative of the judgment and sentence of the trial court. A negative answer . . . is the functional equivalent of an "acquittal" of the death penalty.

Id. at 598 (emphasis added) (citing *Bullington v. Missouri*, 451 U.S. 430 (1981)). If, as Respondent suggests, the second special issue were actually a vehicle for measuring moral culpability, R.B. at 32-33, nothing would have barred the State from seeking a death sentence at Mathes' second trial, because Mathes' "moral culpability" for the second killing would not necessarily have been the same as his culpability for the first.

In sum, Respondent is wrong in asserting that a Texas jury somehow "weigh[s] mitigating evidence as it formulates [its answer to the second issue] in a manner similar to that employed by capital juries in 'pure balancing' States." R.B. at 37 (citation omitted). Whether the second special issue might, with adequate instructions, permit such an interpretation does not change the fact that under *Texas* law, the jury is not authorized to conduct any such "weighing." Instead, the jurors are emphatically charged to answer the questions according to their oath. *See, e.g., Boyd v. State*, 811 S.W.2d 105, 120 (Tex. Crim. App. 1991) ("[T]he Texas sentencing scheme does not allow the jury to actually assess a sentence; a jury's role is limited to answering the three special issues"); *Knox v. State*, 744 S.W.2d 53 (Tex. Crim. App. 1987) ("[Jurors'] attention should be directed only to answering the special issues without regard to the sentence that will ultimately be imposed").[7] The "future dangerousness" question thus af-

[7] Respondent argues that jurors, knowing the ultimate effect of their

fords no fair vehicle for broader mitigating consideration of a teenage defendant's character and background as it impacts on his moral culpability.

Finally, Respondent claims that Mr. Johnson's youth could only have supported a negative answer to the second special issue, and thus the "continuing threat" inquiry afforded an adequate vehicle for the full *mitigating* consideration of his unformed character and youthful infirmities. R.B. at 42-46. Respondent's protestations are unconvincing. Indeed, the Texas Court of Criminal Appeals this month acknowledged that a jury may well treat evidence of youth as an aggravating factor under the second special issue:

> [A] jury might also view youth as an aggravating circumstance based upon the belief that the young defendant would simply use his remaining years to continue a life of crime. See *Graham v. Collins*, 113 S.Ct. at 917 (1993) (Souter, J., dissenting).

Zimmerman v. State, No. 71,106 (Tex. Crim. App. April 7, 1993) slip op. at 23. This simple recognition eloquently refutes Respondent's desperate denials. Indeed, the very fact that only the aggravating "edge" of Mr. Johnson's youth could be given effect under the second special issue requires resentencing.[8]

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answers, would be inclined to give full effect to mitigating evidence. Under the "special issues," of course, this assumption anticipates that jurors would regularly and flagrantly violate their oaths—making their verdict more, not less, capricious.

[8] The court below has, in similar contexts, allowed death sentences to stand where the aggravating aspect of evidence was given effect under the second special issue, but no instruction directing jurors to consider the mitigating aspect of that same evidence was required. *See, e.g., Earhart v. State*, 823 S.W.2d 607, 619 (Tex. Crim. App. 1992). In *Earhart*, the Texas court allowed the state to use evidence of the defendant's mental illness as aggravating proof under the second special issue while denying him an additional instruction under *Penry*. *See Earhart v. Texas*, No. 92-8105 (currently pending on petition for writ of certiorari); R.B. at 19.

The Court of Criminal Appeals' consistent refusal to adopt instructions guiding jurors in the application of the special issue questions underscores another weakness of Respondent's argument. The capital sentencing law of Texas is what the court below says it is, not what Respondent wishes it might be—or might have become—if the facially valid former Texas sentencing statute had been construed differently.

Common sense dictates that the "future dangerousness" issue, contrary to Respondent's assertions, does not magically transcend its evident character as a narrow *factual* inquiry to become instead a vehicle for assessing the appropriateness of a death sentence in light of the defendant's personal culpability. This Court recognized as much in 1976, when it first considered the facial constitutionality of Texas' post-*Furman* statute. Addressing the second special issue, the Court acknowledged that it required precisely the same pedestrian inquiry "performed countless times throughout the American system of criminal justice." *Jurek*, 428 U.S. at 276. This Court recognized that the second special issue asks the same factual question as a judge's "decision whether to admit a defendant to bail." *Id.* at 274. As the latter situation does not naturally require the plenary consideration of a defendant's moral culpability, neither does the "future dangerousness" question of the former Texas scheme.

C. *JUREK V. TEXAS* DOES NOT REQUIRE A RESULT DIFFERENT FROM THAT SOUGHT BY MR. JOHNSON.

Respondent implies that to acknowledge the inadequacy of the former Texas "special issues" as a vehicle for considering Mr. Johnson's youth is to overrule *Jurek v. Texas*, 428 U.S. 262 (1976). At the outset, Mr. Johnson disclaims

any argument that *Jurek* need be overruled. *Jurek*, like its companion cases, is properly understood as sustaining the former scheme against a facial constitutional challenge. That the 1976 decisions confirmed only the facial validity of the Texas, Georgia, and Florida statutes is evident from their explicit language. *See Jurek*, 428 U.S. at 272 (considering the adequacy of the "special issues" on their face, given that the Texas courts had not yet "define[d] precisely the second special issue" nor "construed the first and third special issues" at all); *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("On their face these procedures seem to satisfy the concerns of *Furman*"); *Proffitt v. Florida*, 428 U.S. 242, 251 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies identified in *Furman*").

More importantly, this Court's decision in *Penry* has directly answered this argument. *Penry* held, consistent with *Jurek*, that the Texas special issues as construed by the Texas courts did not permit adequate consideration of Penry's evidence of mental retardation. *Penry* confirmed that, as five Members of the Court had intimated in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), *Jurek* did not "preclud[e] a claim that, in a particular case, the jury was unable to fully consider the mitigating evidence introduced by a defendant in answering the special issues." 492 U.S. at 321. In a similar vein, the Court has continued to adhere to its facial approval of the Georgia and Florida schemes even though it has sustained as-applied challenges to both those statutes. *See Godfrey v. Georgia*, 446 U.S. 420 (1980) (holding that aggravating circumstance provisionally approved in *Gregg v. Georgia*, 428 U.S. 153 (1976), was not applied constitutionally in Godfrey's case); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (holding that Florida scheme provisionally approved in *Proffitt v. Florida*, 428 U.S. 242 (1976), was unconstitutionally applied to a defendant who

sought consideration of unenumerated mitigating circumstances).[9]

Finally, in deciding to what extent, if any, *Jurek* is relevant to the disposition of Mr. Johnson's constitutional challenge, this Court should consider the posture in which the Texas statute came before it in 1976. Texas was one of several states (including North Carolina and Louisiana) that had read *Furman* to require substantially *less* sentencer discretion in capital sentencing. *See Furman v. Georgia*, 408 U.S. 238 (1972).[10] Accordingly, none of the

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[9] Recognizing that this Court's 1976 decisions determined only the facial constitutionality of unique capital sentencing schemes, the lower federal courts have likewise found merit in as-applied challenges to those same schemes. *See, e.g., Spivey v. Zant*, 661 F.2d 464 (5th Cir., Unit B, 1981) (requiring additional jury instructions regarding the consideration of mitigating evidence under the sentencing scheme facially upheld in *Gregg*); *Washington v. Watkins*, 655 F.2d 1346 (5th Cir., Unit A, 1981) (requiring additional jury instructions regarding the consideration of mitigating evidence under Mississippi's sentencing scheme, substantially similar to the one facially upheld in *Proffitt*).

[10] It was reasonable for States to consider the opinions in *Furman* as constitutionally requiring the elimination of all discretion in capital sentencing. *See, i.e., Furman*, 408 U.S. at 307-308 (Stewart, J., discussing the possible constitutionality of mandatory sentencing schemes); *Id.*, at 310 (White, J., indicating that mandatory death penalty schemes would present a different issue than the one raised by discretionary statutes).

This suggestion was so obvious that the Chief Justice, in dissent, commented:

> Real change could clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal. . . . It seems remarkable to me that with our basic trust in lay jurors as the keystone in our system of criminal justice, it should now be suggested that we take the most sensitive and important of all decisions away from them.

Id., at 401-402 (Burger, C.J., dissenting).

petitioners challenging those new statutes claimed that they unduly circumscribed sentencer discretion, and neither the briefs nor the oral argument in this Court focused on whether the Eighth Amendment required individualized sentencing. The Court, however, in examining these mandatory/quasi-mandatory statutes, recognized that such an impulse to deny individualized sentencing was simply an understandable, though ultimately misguided, reaction to *Furman*, and not evidence of an emerging societal consensus that individualized sentencing should be abandoned. In *Woodson v. North Carolina*, for example, this Court said:

> In view of the persistent and unswerving legislative rejection of mandatory death penalty statutes beginning in 1838 and continuing for more than 130 years until *Furman*, it seems evident that the post-*Furman* enactments reflect attempts by the States to retain the death penalty in a form consistent with the Constitution rather than a renewed societal acceptance of mandatory death sentencing.

428 U.S. 280, 298 (1976) (opinion of Stewart, Powell, Stevens, JJ.) (notes omitted).

Thus, in its 1976 death penalty cases, the Court was required to determine whether *Furman* required *no* discretion, or *some* discretion; it did not endeavor to decide *how much* discretion was mandated, or what end the exercise of that discretion was intended to promote. Based on its broad perception that Texas had not abandoned individualization altogether, the Court sustained the former Texas scheme. The Court did not purport to address whether specific mitigating evidence could be fully considered and given effect within the "special issues," precisely because neither the record below nor the adversarial presentation in this Court addressed that issue. Thus, any claim that *Jurek* involved a searching as-applied challenge to the

degree of individualization permitted by the former Texas scheme is plainly mistaken.

Hence, the Court's reading of *Jurek* in *Penry* accurately represents the relationship between the 1976 cases and subsequent decisions concerning as-applied challenges to particular state statutes that precluded consideration of mitigating evidence.[11] This historical and contextual understanding of this Court's precedents thus confirms that *Jurek* is not "difficult to reconcile," R.B. at 14, either with *Penry* or with Mr. Johnson's constitutional challenge to his death sentence.

CONCLUSION

Respondent at last submits that "the inherently 'moral' nature of the [capital sentencing] jury's decision" will somehow compel juries to ignore the fact-based inquiries of the former Texas sentencing scheme and consider all relevant dimensions of mitigating evidence before assessing punishment. *See* R.B. at 36. Respondent thus seems to suggest that Texas jurors will regularly flout their solemn oath and ignore the letter of their instructions in order to arrive at the sentence they think appropriate. *Id.* This Court should decline Respondent's cynical invitation to ignore the patent deficit of the former "special issues" as applied to a teenage defendant. As recognized in 1976:

> There is an element of capriciousness in making the jurors' power to avoid the death penalty de-

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[11] This Court has since recognized the symmetry between these two precedents:

> *Penry* interpreted *Jurek* as holding the death penalty statute is constitutional so long as it is interpreted by the Texas courts to permit the jury to consider mitigating circumstances proffered by the defendant.

Saffle v. Parks, 494 U.S. 484, 492 (1990).

> pendent on their willingness to accept this invitation to disregard the trial judge's instructions.

Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 335 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). *See also Beck v. Alabama*, 447 U.S. 625, 643 (1980) (such procedures "introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (the constitutionality of a scheme cannot rest on a "particular jury's willingness to act lawlessly.")

While the former Texas special issues may permit the jury to consider youth for some *other* purpose, they do not permit the jury to consider it as reducing the defendant's culpability so as to justify a life sentence. Therefore, for all the reasons set out in Mr. Johnson's opening brief, and in this Reply, he renews his request that this Court reverse the judgment of the Texas Court of Criminal Appeals in his case and remand with directions to vacate his unconstitutional sentence of death.

Respectfully submitted,

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No. 92-5653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DORSIE LEE JOHNSON,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Did *Jurek* v. *Texas* approve the Texas capital sentencing system of considering youth as mitigating only as it bears on future dangerousness?

2. If so, should *Jurek* be overruled?

IN THE

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DORSIE LEE JOHNSON,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF RESPONDENT

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of respondent in the above captioned case. Counsel for respondent has consented, but counsel for petitioner has refused consent.

In the accompanying brief, *amicus* argues that *Jurek* v. *Texas* is dispositive of this case unless overruled, and that *Jurek* ought not be overruled.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and

reliable determination of guilt and swift execution of punishment.

Capital punishment has three functions: incapacitation, deterrence, and retribution. It cannot perform these functions if this Court constantly changes the rules, striking down systems it has previously upheld. Such undermining of the interests of victims of crime is contrary to the rights CJLF was formed to protect.

For the foregoing reasons, *amicus curiae* requests leave to file its brief.

April, 1993

Respectfully submitted,

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TABLE OF CONTENTS

Questions presented i

Motion for leave to file iii

Table of authorities vii

Brief *amicus curiae* 1

Summary of facts and case 1

Summary of argument 3

Argument 3

I

Jurek cannot be reconciled with the requirement defendant seeks to impose 4

II

Jurek has not been overruled to date 8

A. *Lockett* and its progeny 8

B. *Penry* v. *Lynaugh* 10

C. *Parks* and *Graham* 12

III

For the reasons stated in *Casey*, *Jurek* should not be overruled 15

A. Normal stare decisis analysis 15

1. Workability 15

2. Reliance 16

3. Development of the law 17

4. Changed facts 17

B. National controversies 18

1. Public confidence 19

2. Promise of constancy 20

IV

Penry should remain limited to its narrow interpretation 22

Conclusion 23

TABLE OF AUTHORITIES

Cases

Ake v. Oklahoma, 470 U. S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985) 16

Broadrick v. Oklahoma, 413 U. S. 601, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973) 6

Brockett v. Spokane Arcades, Inc., 472 U. S. 491, 86 L. Ed. 2d 394, 105 S. Ct. 2794 (1985) 6

Eddings v. Oklahoma, 455 U. S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982) 10

Franklin v. Lynaugh, 487 U. S. 164, 101 L. Ed. 2d 155, 108 S. Ct. 2320 (1988) 12, 16

Furman v. Georgia, 408 U. S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) 19, 20

Graham v. Collins, 122 L. Ed. 2d 260, 113 S. Ct. 892 (1993) 12, 13, 14, 17, 22

Gregg v. Georgia, 428 U. S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) 7, 8

Griffith v. Kentucky, 479 U. S. 314, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987) 17

Hitchcock v. Dugger, 481 U. S. 393, 95 L. Ed. 2d 347, 107 S. Ct. 1821 (1987) 10, 17

Illinois v. Gates, 462 U. S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983) 16

Johnson v. State, 773 S. W. 2d 322 (Tex. Crim. App. 1989) 1, 2

Jurek v. State, 522 S. W. 2d 934 (1975) 4

Jurek v. Texas, 428 U. S. 262, 49 L. Ed. 2d 929, 96 S. Ct. 2950 (1976) ..... Passim

Lockett v. Ohio, 438 U. S. 586, 57 L. Ed. 2d 973,
98 S. Ct. 2954 (1978) 9, 10, 19

Marbury v. Madison, 1 Cranch (5 U. S.) 137,
2 L. Ed. 60 (1803) 5

Marks v. United States, 430 U. S. 188, 51 L. Ed. 2d 260,
97 S. Ct. 990 (1977) 16

McGautha v. California, 402 U. S. 183, 28 L. Ed. 2d 711,
91 S. Ct. 1454 (1971) 19

New York v. Ferber, 458 U. S. 747, 73 L. Ed. 2d 1113,
102 S. Ct. 3348 (1982) 6

Payne v. Tennessee, 115 L. Ed. 2d 720,
111 S. Ct. 2597 (1991) 5, 16

Pennsylvania v. Bruder, 488 U. S. 9, 102 L. Ed. 2d 172,
109 S. Ct. 205 (1988) 8

Penry v. Lynaugh, 492 U. S. 302, 106 L. Ed. 2d 256,
109 S. Ct. 2934 (1989) 2, 5, 11, 12, 13, 17, 22

Planned Parenthood v. Casey, 120 L. Ed. 2d 674,
112 S. Ct. 2791 (1992) 8, 14, 15, 17, 19, 21, 22

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158,
53 S. Ct. 55 (1932) 16

Proffitt v. Florida, 428 U. S. 242, 49 L. Ed. 2d 913,
96 S. Ct. 2960 (1976) 8

Roberts v. Louisiana, 428 U. S. 325, 49 L. Ed. 2d 974,
96 S. Ct. 3001 (1976) 5, 9

Saffle v. Parks, 494 U. S. 484, 108 L. Ed. 2d 415,
110 S. Ct. 1257 (1990) 12, 13

Schall v. Martin, 467 U. S. 253, 81 L. Ed. 2d 207,
104 S. Ct. 2403 (1984) 6

Skipper v. South Carolina, 476 U. S. 1, 90 L. Ed. 2d 1,
106 S. Ct. 1669 (1986) 10

Smith v. Murray, 477 U. S. 527, 91 L. Ed. 2d 434,
106 S. Ct. 2661 (1986) 20

United States v. Raines, 362 U. S. 17, 4 L. Ed. 2d 524,
80 S. Ct. 519 (1960) 5, 20

United States v. Salerno, 481 U. S. 739, 95 L. Ed. 2d 697,
107 S. Ct. 2095 (1987) 6

Walton v. Arizona, 497 U. S. 639, 111 L. Ed. 2d 511,
110 S. Ct. 3047 (1990) 19

Woodson v. North Carolina, 428 U. S. 280,
49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976) 9

Statute

3A Tex. Code Crim. Proc. Ann., Art. 37.071(2)(e)
(Vernon Supp. 1993) 21

Treatise

R. Rotunda & J. Nowak, Treatise on Constitutional Law
(2d ed. 1992) 5

Miscellaneous

U. S. Bureau of Justice Statistics, Capital Punishment
1989 (1990) 16

U. S. Bureau of Justice Statistics, Sourcebook of
Criminal Justice Statistics—1991 (1992) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DORSIE LEE JOHNSON,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

SUMMARY OF FACTS AND CASE

On March 23, 1986, defendant petitioner Dorsie Johnson and his accomplice Amanda Miles decided to rob Allsup's convenience store in Snyder, Texas. They decided in advance that they would murder any witnesses. Johnson ordered the clerk, Jack Huddleston, to lie on the floor. Johnson then shot Huddleston in the back of the neck, killing him. The robbery netted $160 and two cartons of cigarettes. *Johnson* v. *State*, 773 S. W. 2d 322, 324 (Tex. Crim. App. 1989).

Johnson subsequently robbed another store. Johnson shot the store owner in the face, and his accomplice stabbed the owner in the back. Fortunately, they did not succeed in killing him. Pet. Brief 6-7. Following his arrest for the second robbery and attempted murder, Johnson confessed to the murder of Jack Huddleston. 773 S. W. 2d, at 324.

In the penalty phase, the principal defense witness was defendant's father, Dorsie Johnson, Sr. Mr. Johnson emphasized his son's youth, 19 at the time of the crime, and involvement with drugs. He tied his testimony directly to the question of future dangerousness, emphasizing his son's potential for rehabilitation. Pet. Brief 7-8.

The trial judge instructed the jury on the Texas "special issues," which ask the jury about the deliberateness of the crime and the probability that the defendant would be dangerous in the future. The judge also modified the statutory instructions to explicitly tell the jury to consider mitigating evidence in determining the special issues. However, the court refused to instruct the jury to consider mitigating evidence outside the framework of the special issues. The jury answered the questions "yes," and Johnson was accordingly sentenced to death. Pet. Brief 10; App. Pet. Cert. B-1.

The Texas Court of Criminal Appeals affirmed on June 21, 1989. 773 S. W. 2d, at 322. Five days later, this Court decided *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). Johnson petitioned for rehearing based on *Penry*, contending insufficient consideration of his youth as a mitigating factor. The state court denied rehearing in an unpublished opinion. It held that the instructions in the case permitted the jury "to express a reasoned moral response to applicant's youth." App. Pet. Cert. B-3.

Johnson filed a petition for writ of certiorari in this Court. The only question relating to the instruction of the jury was this: "Did the Texas capital sentencing statute unconstitutionally preclude the jury from giving full mitigating effect to the petitioner's youthful age at the time of the offense?" Pet. Cert. i. The Court granted certiorari limited to this question on February 19, 1993.[1]

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1. Defendant now appears to regret his own decision to limit consideration to the question of age. See Pet. Brief 26, n. 14.

SUMMARY OF ARGUMENT

Jurek v. *Texas* controls this case. *Jurek* considered the constitutionality of the Texas system as applied to the facts in that case and found that the special issues provided constitutionally sufficient consideration of Jurek's mitigating evidence. The cases are factually indistinguishable.

Jurek has not been overruled to date. *Penry* v. *Lynaugh* created an exception for cases where important mitigating evidence cannot be given *any* mitigating force under the Texas special issues. While *Penry* might, on its face, be read more broadly, any such interpretation is precluded by *Saffle* v. *Parks* and *Graham* v. *Collins*.

For the reasons stated in *Planned Parenthood* v. *Casey*, *Jurek* should not be overruled now. The *Jurek* rule is not unworkable. Texas has a massive reliance interest in preserving judgments tried according to this Court's determination of constitutionality. *Jurek* is not a remnant of abandoned doctrine, and there are no changed facts justifying its repudiation.

Capital punishment is an issue of great national controversy. The people of America have already been badly whipsawed on this issue. To strike down a sentencing system previously approved would do grave damage to this Court as an institution and to the people's faith in the rule of law.

ARGUMENT

Petitioner Johnson contends that the Texas death penalty statute upheld in *Jurek* v. *Texas*, 428 U. S. 262 (1976) is unconstitutional as applied to him. The reason, he claims, is that even though the jury could have considered his youth in answering the "dangerousness" question, the jury was not permitted to consider whatever mitigating force his youth had beyond the scope of that question.

Given that *Jurek* upheld the sentencing system used in this case, Johnson's claim raises three questions. Can his position be reconciled with *Jurek*? If not, has *Jurek* already been overruled *sub silento*? If not, should *Jurek* be overruled in this case? The answer to all three, *amicus* submits, is no.

I. *Jurek* cannot be reconciled with the requirement defendant seeks to impose.

Jurek v. *Texas*, 428 U. S. 262 (1976), the primary case on the constitutionality of the Texas system, is conspicuous by its absence from the defendant's argument. His brief makes only one passing reference to it. See Petitioner's Brief v, 17. There is a good reason for this curious absence. *Jurek* is flatly contrary to defendant's position.

Jurek, like Johnson, was young at the time of the crime. He was 22. *Jurek*, 428 U. S., at 266. In considering Jurek's case, the Texas Court of Criminal Appeals held that age could be considered in mitigation in the course of answering the second question. *Id*., at 272-273 (quoting *Jurek* v. *State*, 522 S. W. 2d 934, 939-940 (1975)). This Court squarely and unmistakably held that this consideration of Jurek's proffered mitigation met the requirements of the Eighth Amendment. The joint opinion of Justices Stewart, Powell, and Stevens[2] examined the very question at issue today and held that the Texas procedure fulfilled the constitutional requirement in that it "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender . . . ." *Id*., at 274. Though it is patently obvious that Jurek's mitigating evidence did have relevance beyond the statutory questions, the Constitution did not require further instruction in 1976.

2. For brevity, we will refer to this opinion as the "lead opinion."

Justice White's concurring opinion, joined by Chief Justice Burger and Justice Rehnquist, was even more clearly in favor of validity, denying that there was any requirement to consider mitigation at all. *Id*., at 279 (citing *Roberts* v. *Louisiana*, 428 U. S. 325, 348-350 (1976) (dissent)). Justice Blackmun's statement, by incorporating his *Furman* dissent, similarly affirms that the judiciary has no authority to create a mitigation requirement. 428 U. S., at 279. Thus, not only did *Jurek* expressly uphold the procedure in question on indistinguishable facts, it did so overwhelmingly. Cf. *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 737-738, 111 S. Ct. 2597, 2610-2611 (1991) (decision by narrow margin).

Penry v. *Lynaugh*, 492 U. S. 302, 315 (1989) says that *Jurek* dealt with "the facial validity of the Texas death penalty statute." Defendant gives this statement its most extreme interpretation. He contends that *Jurek* stands for nothing more than the proposition that the Texas system does not produce an invalid sentence in *every* case. Pet. Brief 17. Both the opinion itself and the normal functioning of the adjudication process contradict this narrow reading.

Neither this Court nor any other federal court has the authority to strike down a statute in the abstract. The power of judicial review exists only as a component of the power and the duty to decide cases. See *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 177-178 (1803); *United States* v. *Raines*, 362 U. S. 17, 20-21 (1960). Courts decide cases on the facts presented by the cases, and a wide variety of jurisdictional and prudential doctrines have grown up to prevent the pronouncement of doctrine on abstract questions not actually presented by the dispute before the courts. See generally 1 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 2.13, at 161-242

(2d ed. 1992) (discussing "case or controversy," advisory opinions, mootness, ripeness, finality, and standing).

A "facial challenge" is a departure from the norm, because it does not look to the facts of a concrete dispute. Usually, this departure is made necessary by the procedural posture of the case. When a class action is brought, a facial challenge, if successful, will obtain relief for the entire class without litigating each application. See, *e.g.*, *Schall* v. *Martin*, 467 U. S. 253, 268, n. 18 (1984). An action for declaratory and injunctive relief brought by persons who wish to engage in proscribed activity in the future may be brought as a facial challenge, see, *e.g.*, *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 494 (1985), because they do not wish their future freedom of action to be limited to the facts presented in the action. In the First Amendment area, one who seeks to invoke the "overbreadth" doctrine necessarily makes a facial challenge, since the challenger is taking advantage of a special exception to the normal rules of standing, attacking the statute as applied to others, even though it is constitutional as applied to him. See *New York* v. *Ferber*, 458 U. S. 747, 768-769 (1982).

Outside the First Amendment area, criminal defendants appealing their convictions and sentences very rarely limit themselves to facial attacks, for good reason. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no* set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) (emphasis added). In *Salerno*, the preventive detention case, the trial court had found that the defendant was the "boss" of a criminal organization which routinely engaged in violence, including murder. *Id.*, at 743-744. It is inconceivable that if preventive detention were permitted at all, it would not be permitted in such a case. Salerno lost nothing by foregoing the "as applied" challenge.

Defendant's reading of *Jurek* implies that Jurek's renowned counsel intentionally threw away the "as applied" challenge even though his client's life literally depended on it. To sustain defendant's position without distinguishing or overruling *Jurek*, it would be necessary to conclude that this Court affirmed Jurek's sentence and condemned him to death because the statute in question *might* be constitutional as applied to *other* defendants even though it contained a glaring constitutional defect *as applied to Jurek*. The *Jurek* Court and counsel should not be accused of perpetrating such a bizarre injustice without exceptionally compelling evidence. In fact, the opinion clearly states the exact opposite.

Jurek had filed a certiorari petition presenting two questions. The first one was "Does the imposition and carrying out of the sentence of death for the crime of murder under the law of Texas violate the Eighth or Fourteenth Amendment to the Constitution of the United States?" The second question dealt with admissibility of a confession. Petition for Writ of Certiorari in *Jurek* v. *Texas*, No. 75-5394, at 2. This Court granted certiorari limited to the first question. 423 U. S. 1082.

The question presented does not unambiguously limit itself to a contention that the statute is unconstitutional in *all* cases, and the *Jurek* lead opinion did not understand the question to be so limited. Nowhere does the opinion use the term "facial challenge." The lead opinion describes in detail the facts of the individual case, which would be irrelevant under defendant's interpretation. *Jurek*, *supra*, 428 U. S., at 264-268. Most importantly, however, the lead opinion very clearly states the question before the Court. "We granted certiorari, 423 U. S. 1082, to consider whether imposition of the death penalty *in this case* violates the Eighth and Fourteenth Amendments . . . ." *Id.*, at 268 (emphasis added). There is similar language in the companion cases. See *Gregg* v.

Georgia, 428 U. S. 153, 162 (1976); *Proffitt* v. *Florida*, 428 U. S. 242, 247 (1976).[3]

Jurek thus holds that the Texas death penalty statute is constitutional as applied to Jurek, and not merely as it might be applied to some future defendant. The very essence of precedent is that a case must be decided the same way as an earlier case with indistinguishable facts, unless that earlier case is overruled. See, *e.g.*, *Pennsylvania* v. *Bruder*, 488 U. S. 9, 11 (1988). Since defendant does not and cannot distinguish *Jurek*, precedent requires affirmance, unless *Jurek* is overruled.

II. *Jurek* has not been overruled to date.

Gregg and its companion cases appeared to resolve two of the most divisive legal issues of modern times: that capital punishment is constitutional and that three of the five sentencing systems considered were constitutional. In light of the magnitude of these issues, one would expect that this Court would consider them as finally resolved and would not reopen them without a justification beyond dispute. See *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 707, 112 S. Ct. 2791, 2814 (1992). Tragically for the law-abiding people of America, it was not to be.

A. Lockett and Its Progeny.

Along with the Texas system approved in *Jurek*, two other capital sentencing systems were approved the same day. "In *Gregg* v. *Georgia*, we today hold constitutionally valid a capital-sentencing system that directs the jury to consider *any* mitigating factors, and in *Proffitt* v. *Florida*

3. *Gregg* refers to a "limited grant of certiorari" in the context of discussing the vagueness of aggravating circumstances which were *not* found in Gregg's case. 428 U. S., at 201, n. 51; *id.*, at 161. This is entirely different from ignoring a constitutional flaw in the case before the Court. The analogous portion of *Proffitt* pays close attention to the facts of the case. 428 U. S., at 255-256 and nn. 12-13.

we likewise *hold constitutional* a system that directs the judge and advisory jury to consider *certain enumerated* mitigating circumstances." *Jurek* v. *Texas*, 428 U. S. 262, 271-272 (1976) (lead opinion) (emphasis added). Words can hardly be more clear. The Florida system was valid even though the sentencer was not told to consider any circumstances other than those on the list. The *Proffitt* lead opinion made clear that it understood the sentencer was directed to consider only the "seven mitigating factors [listed in the statute] to determine whether the death penalty shall be imposed." *Proffitt* v. *Florida*, 428 U. S. 242, 251 (1976). Two mandatory sentencing systems were struck down. *Roberts* v. *Louisiana*, 428 U. S. 325 (1976); *Woodson* v. *North Carolina*, 428 U. S. 280 (1976).

In *Lockett* v. *Ohio*, 438 U. S. 586 (1978), the Court was faced with an odd hybrid statute. A life sentence could be imposed only if one of three seldom-occurring mitigating circumstances was present: victim induced murder, duress or strong provocation, or psychosis or mental deficiency. *Id.*, at 607. Thus, in the vast majority of cases, a death sentence would be mandatory upon the finding of an aggravating circumstance.

Because this system was mandatory in the vast majority of cases, it could have been struck down under the principles of *Roberts* and *Woodson*. Instead, the *Lockett* plurality chose to reach out and create a sweeping new rule. It held that the sentencer "not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604 (emphasis in original).

This rule would appear on its face to overrule *Proffitt*'s holding that instruction of the jury on certain enumerated circumstances was proper. However, *Lockett* muddied its own waters by denying it overruled *Proffitt*, noting that the statute in Florida did not specifically tell the sentencer to

ignore nonstatutory factors. *Id.*, at 606, n. 15. The crowning irony of *Lockett* is that this opaque opinion declares, correctly, that "[t]he States now deserve the clearest guidance that the Court can provide." *Id.*, at 602. They did not receive it.

If *Lockett* did not overrule *Proffitt*, as it says it did not, the two can be reconciled only by a narrow construction of *Lockett*'s double negative "not be precluded." These words cannot mean that there is an affirmative requirement to instruct the jury to consider any and all proffered mitigation, unless it overrules *Proffitt*'s validation of the Florida instructions in that case. Perhaps *Lockett* only meant that the sentencer cannot be expressly forbidden to consider nonstatutory mitigation. The next two *Lockett* cases were consistent with this narrow construction. In *Eddings* v. *Oklahoma*, 455 U. S. 104, 109 (1982), the judge believed he was legally precluded from considering important mitigating evidence, and in *Skipper* v. *South Carolina*, 476 U. S. 1, 3 (1986), the judge had excluded the evidence altogether.

Only in *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987) did this Court make clear that it had indeed overruled *Proffitt*. *Hitchcock* quoted disapprovingly the trial judge's description of Florida sentencing law: " '[T]his Court [the trial court] is mandated to apply the facts to *certain enumerated* "aggravating" and "mitigating" circumstances.' 10 Record 195 (emphasis added)." *Id.*, at 398. *Hitchcock* thus emphasized and condemned as constitutional error the trial judge's use of *precisely* the same words which this Court itself had used to describe the Florida system on the day it upheld that system. See *Jurek*, *supra*, 428 U. S., at 272.

B. Penry v. Lynaugh.

Texas, however, still thought that it was safe. The Texas statute never mentioned mitigating circumstances at all; they were only implicit in the statutory questions. *Jurek* had held quite clearly that this was constitutional.

In *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), the majority construed *Jurek* to have upheld the Texas statute "on the basis of assurances that the special issues would be interpreted broadly enough to enable sentencing juries to consider *all* of the relevant mitigating evidence a defendant might present." *Id.*, at 318 (emphasis added). Unlike the Florida situation, this was at least a plausible reading of *Jurek*, which had interpreted the state construction of the statute to include "*whatever* mitigating circumstances [defendant] may be able to show." *Jurek*, *supra*, 428 U. S., at 272 (emphasis added).

In addition to the *Lockett* requirement that the sentencer not be precluded from considering any evidence, there is another, quite different, proposition advanced in *Penry*. That is the notion that even if an item of evidence *is* relevant to the statutory special issue, and even if the sentencer *can* give effect to that item, the sentencing system is nonetheless unconstitutional if the item has additional mitigating force beyond its relevance to the statutory issue. This would seem to be what the majority means by "fully consider." See *Penry*, 492 U. S., at 321. Unfortunately, these two very different propositions are so intertwined in the *Penry* opinion that it is difficult to tell if the holding of the case is based on both or just the first.

If *Penry* were writing on a clean slate, the most plausible reading would be that it both reasserts the *Lockett* "all evidence" rule and creates a new "all possible implications of all evidence" rule. *Penry* itself, however, erects an impenetrable barrier to this interpretation. It emphatically denies that it creates any new rules. See *id.*, at 319.

On its facts, *Penry* fits within the *Lockett* rule. A defendant whose moderate retardation did not prevent him from deliberating and will make him a continuing

danger in the future has a powerful factor in mitigation which cannot honestly justify a negative answer to either of the special issues. See *id.*, at 323. The result that the Texas system may require additional instructions in a few, rare cases can be consistent with a somewhat strained interpretation of *Jurek*.

The more expansive interpretation, however, cannot be reconciled with *Jurek*. The case in which the defendant has *no* mitigating evidence with *any* relevance beyond the special issues will be quite rare. *Franklin* v. *Lynaugh*, 487 U. S. 164, 185 (1988) (O'Connor, J., concurring in the judgment) provides one example, but *Jurek* itself provides the counter-example. Jurek's youth, steady employment, and contribution to his family's welfare, 428 U. S., at 266-267, indisputably had mitigating relevance beyond future dangerousness, yet his sentence was affirmed. As noted earlier, the Court granted certiorari in *Jurek* "to consider whether the imposition of the death penalty *in this case* violates the Eighth and Fourteenth Amendments . . . ," *id.*, at 268 (emphasis added), and decided it did not. That conclusion cannot be reconciled with the expansive interpretation of *Penry*.

C. Parks and Graham.

In addition to *Penry*'s own holding that it did not overrule *Jurek*, we have the further reassertion of *Jurek* in *Saffle* v. *Parks*, 494 U. S. 484 (1990) and *Graham* v. *Collins*, 122 L. Ed. 2d 260, 113 S. Ct. 892 (1993). In *Parks*, the habeas petitioner's contention was that an instruction to the jury not to consider sympathy violates the Eighth Amendment. 494 U. S., at 486. Rejecting the argument that *Lockett* and *Eddings* dictated this result, the Court said "Parks asks us to create a rule relating, not to *what* mitigating evidence the jury must be permitted to consider in making its sentencing decision, but to *how* it must consider the mitigating evidence." *Id.*, at 490 (emphasis in original).

The distinction made by this passage is precisely the distinction between the two threads in the *Penry* opinion. The requirement that the jury be given *some* vehicle to consider Penry's retardation is pure *Lockett*; it relates to *what* evidence must be considered. The contention that the jury must be instructed to consider every mitigating *aspect* of the evidence would be a new rule relating "to *how* it must consider the mitigating evidence." *Parks* goes on to explicitly discuss *Penry* and give it the narrower interpretation. *Parks* notes that Penry's claim was, in part, that the jury was precluded from "giving *any* mitigating effect" to his evidence, *id.*, at 491 (emphasis added), and only that portion of the claim did not require creation of a new rule. "Here, by contrast, there is no contention that the State *altogether prevented* Parks' jury from considering . . . all of the mitigating evidence . . . ." *Ibid.* (emphasis added).

Finally, *Parks* explicitly affirms that *Penry* did not overrule *Jurek*. "The *Penry* Court's conclusion . . . *must be understood in terms of the Court's ruling in Jurek*, and its application in later cases." *Id.*, at 492 (emphasis added). Thus, to the extent that broad language in *Penry* might be construed to overrule *Jurek*, that language was disapproved, and *Jurek* was reaffirmed, in *Parks*.

Graham v. *Collins*, *supra*, follows directly from *Parks*. The narrow reading of *Penry* and the statement that *Penry* did not overrule *Jurek* necessarily lead to the conclusion that a habeas petitioner who does seek to overrule *Jurek* seeks the creation of a new rule.

Graham claimed that his evidence was not given "full mitigating effect" under the Texas special issues, 122 L. Ed. 2d, at 294, 113 S. Ct., at 917 (Souter, J., dissenting), yet his evidence was not a different kind from Jurek's, see *id.*, 122 L. Ed. 2d, at 275, 113 S. Ct., at 902 (majority). To the extent that *Penry* was based on the notion that *Jurek* was limited to the "facial validity" of the Texas statute, see *Penry*, *supra*, 492 U. S., at 315, that

notion is repudiated in *Graham*. *Graham* reads *Jurek* as holding that the Texas system was constitutional as applied to Jurek on the facts of his case, 122 L. Ed. 2d, at 275, 113 S. Ct., at 902, which is indeed what the *Jurek* lead opinion says, see *ante*, at 7.

To recap, then, the present state of the body of precedent is this. *Jurek* held that the Texas system was constitutional on its face and as applied to Jurek. The *Lockett* line of cases holds that the sentencer may not be altogether prevented from considering any item of mitigating evidence. *Penry* holds that additional instruction beyond the Texas special issues may be required in an unusual case, where the defendant has powerful mitigating evidence that cannot be given any consideration under the special issues.

To the extent *Penry* may be read to go beyond *what* the jury considers into *how* the jury considers it, that interpretation is repudiated by *Parks*. To the extent *Penry* may be read as holding that Texas juries must give "full effect" as opposed to "some effect" to mitigating evidence, that interpretation is repudiated by *Graham*. To the extent that *Penry* may be based on the notion that *Jurek* did not consider constitutionality of the statute as applied to the facts of Jurek's case, that notion is repudiated by *Graham*. To the extent that *Penry* may be interpreted to overrule *Jurek*, that interpretation is refuted by *Parks*, *Graham*, and *Penry* itself.

Graham is now precedent that the extension of *Penry* which Graham sought and which Johnson now seeks requires an overruling of *Jurek*. See *Graham*, *supra*, 122 L. Ed. 2d, at 275, 113 S. Ct., at 902 ("wholesale abandonment of *Jurek*"). The sole remaining question is whether *Jurek* should, indeed, be overruled. For the reasons set forth in *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992), *amicus* submits that *Jurek* should not be overruled.

III. For the reasons stated in *Casey*, *Jurek* should not be overruled.

In *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 704, 112 S. Ct. 2791, 2812 (1992), this Court identified four factors governing the decision to overrule a precedent in "normal *stare decisis* analysis" and additional considerations which apply to "national controversies." *Amicus* submits that both types of considerations apply to *Jurek* and that all applicable factors weigh against its overruling.

A. Normal Stare Decisis Analysis.

In deciding whether to overrule a precedent, this Court

> "may ask whether the rule has proved to be intolerable simply in defying practical workability [citation]; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation [citation]; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine [citation]; or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification [citation]." *Id.*, 120 L. Ed. 2d, at 700, 112 S. Ct., at 2808-2809.

1. Workability.

There is nothing unworkable about the *Jurek* rule. That case approved the practice of instructing juries in the terms of the statute. The *Penry* exception to *Jurek* does introduce some additional complication, since it requires a case by case analysis of the mitigating evidence to determine whether the evidence in a given case could not be given any effect. This difficulty is no greater than the difficulty of the rule Johnson proposes, which would require case by case analysis of the type in Justice

O'Connor's opinion in *Franklin* v. *Lynaugh*, 487 U. S. 164, 185-187 (1988). If practical workability were the driving force for overruling, it would point toward overruling *Penry*, not *Jurek*.

2. Reliance.

The reliance interest in this case is monumental. Enforcement of the criminal law is the single most important function of state government. See *Illinois* v. *Gates*, 462 U. S. 213, 237 (1983). Capital cases are, by their nature, the most important cases in that function. The state must devote enormous resources, both to investigate and litigate its own case and to provide counsel and experts for the defendant. See *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Ake* v. *Oklahoma*, 470 U. S. 68 (1985). In 1989, when *Penry* was decided, there were around 300 prisoners under sentence of death in Texas, U. S. Bureau of Justice Statistics, Capital Punishment 1989, at 6 (1990), all of them tried and sentenced in reliance on this Court's holding in *Jurek* that the Texas system was constitutional.

Payne v. *Tennessee*, 115 L. Ed. 2d 720, 737, 111 S. Ct. 2597, 2610 (1991) noted that reliance interests are generally at a minimum in cases of procedure and evidence. That is true for rules favoring the defendant. Virtually no one decides to commit a crime based on existing rules of procedure, and any such reliance would not be legitimate.[4] Furthermore, because the prosecution cannot appeal an acquittal, a defendant who successfully invokes an existing rule at trial has nothing to fear from a later reversal of that rule.

For the prosecution, the situation is quite different. Defendants *can* appeal, and if an old rule is overturned,

4. A person may well rely on an existing rule of *substantive* law that his conduct is legal. Such reliance is fully protected by the Due Process Clause. See *Marks* v. *United States*, 430 U. S. 188, 191-192 (1977).

every pending appeal is decided under the new rule. *Griffith* v. *Kentucky*, 479 U. S. 314, 328 (1987). Because of their complexity, capital appeals may not become final for many years after trial. The present case was tried over six years ago. Pet. Brief 3. Since "virtually *any* mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability' apart from its relevance to the particular concerns embodied in the Texas special issues," *Graham* v. *Collins*, 122 L. Ed. 2d 260, 275, 113 S. Ct. 892, 902 (1993) (emphasis in original), accepting Johnson's new rule would require retrial of many years of cases. Such a massive expenditure of scarce judicial resources would require an exceptionally compelling justification.

3. Development of the law.

The day after *Penry* was decided, the argument could have been made that *Jurek* was nothing but an empty shell. See *Penry* v. *Lynaugh*, 492 U. S. 302, 354-355 (1989) (Scalia, J., dissenting). If subsequent cases had read *Penry* as Justice Scalia's dissent read it, then it could be said that *Jurek* was "no more than a remnant of abandoned doctrine." *Casey*, *supra*, 120 L. Ed. 2d, at 700, 112 S. Ct., at 2808.

However, as discussed in part II-C, *ante*, 12-14, *Parks* and *Graham* have limited *Penry* and reaffirmed *Jurek*. If any case in the line is a "remnant of abandoned doctrine," it is *Penry*, not *Jurek*.

4. Changed facts.

Defendant makes something of a "changed facts" argument in his discussion of *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987). He reads *Hitchcock* as being the product of "experience" with the Florida system approved in *Proffitt* and the result of observing that system "in practice." Pet. Brief 14-15 and n. 7. Defendant reads *Hitchcock* as a factual discovery that some Florida

sentencers were not considering some mitigating circumstances, thereby justifying a departure from *Proffitt*. An analogous argument would be that experience in Texas indicates that some mitigating evidence, although relevant to the second special issue, cannot be "fully considered" under that issue.

The fallacy here is that experience has not shown anything that was not obvious at the time of the earlier decisions. The Court was well aware in 1976 that the Florida system limited mitigation to "certain enumerated mitigating circumstances." *Jurek* v. *Texas*, 428 U. S. 262, 272 (1976). Similarly, it was well aware that the Texas system permitted consideration of Jurek's youth and other mitigating evidence *only* to the extent that they bore on future dangerousness. *Ibid*.

Neither *Proffitt* nor *Jurek* was based on a factual belief that the system under consideration permitted the sentencer to consider *every* mitigating aspect of *every* mitigating fact the defendant might proffer. No rational person could believe either system did on the record before the Court in the actual cases. Both cases upheld the systems involved because there was no constitutional requirement for unlimited consideration of mitigation. The fact that neither system allows such unlimited consideration is not a "changed fact"; it is a fact that was known from the very beginning.

The "factual underpinnings" of *Jurek* have not changed. Consequently, "the court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of [1976]." *Casey*, *supra*, 120 L. Ed. 2d, at 706, 112 S. Ct., at 2813-2814.

B. National Controversies.

Capital punishment, like abortion, economic legislation, and segregation, is an issue of intense national debate. Every presidential candidate declares his position

on the issue, and those who publicly oppose it are invariably defeated. Support for the death penalty now runs over four to one in favor. U. S. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1991, at 211 (1992).[5] Special caution is needed in areas of such magnitude.

1. Public confidence.

"There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith." *Casey*, *supra*, 120 L. Ed. 2d, at 708, 112 S. Ct., at 2815. In the case of capital punishment, that point has already been reached, not with outright, honest overrulings but instead with effective overrulings based on flimsy or nonexistent distinctions.

In *McGautha* v. *California*, 402 U. S. 183 (1971), the question of the constitutionality of unbridled sentencing discretion was squarely before the Court. The ruling was clear and unequivocal. "[W]e find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to *anything* in the Constitution." *Id*., at 207 (emphasis added). Yet only one year later, the precise argument so clearly rejected in *McGautha* was accepted in *Furman* v. *Georgia*, 408 U. S. 238 (1972), through the disingenuous device of engrafting procedural requirements onto the previously purely substantive Cruel and Unusual Punishment Clause. As discussed in part II-A, *ante*, 8-10, this Court did a second about-face in the *Lockett* line of cases, striking down the system it had expressly approved in *Proffitt*. See *Lockett* v. *Ohio*, 438 U. S. 586, 622 (1978) (White, J., dissenting in part) ("about-face"); *id*., at 629 (Rehnquist, J., dissenting) ("pillar to post"); *Walton* v. *Arizona*, 497 U. S. 639, 667-

5. This figure actually understates the support. Survey respondents are asked about the penalty for murder generally, not the smaller subclass of the worst murderers actually eligible for the penalty. *Ibid*.

668 (1990) (Scalia, J., concurring in part). Two disapprovals of expressly approved systems are quite enough.

The entire edifice of "procedurally cruel and unusual punishment" is built on the shakiest of foundations. If the public is to accept these limitations as genuine, this Court's precedents must mean something. Approval of a state's sentencing system cannot have such a limited meaning that the vast majority of defendants can successfully attack the statute as applied to their cases. Even the "facial" challenge, which defendant claims *Jurek* was, should have been successful if the system were unconstitutional in the vast majority of its intended applications, cf. *United States* v. *Raines*, 362 U. S. 17, 23 (1960), for if it were the remaining few sentences would be "a capriciously selected random handful," see *Furman*, *supra*, 408 U. S., at 309-310 (Stewart, J., concurring).

Constitutionality of the system, at a rock bottom minimum, must mean that the system approved is free of the kind of systemic flaws that would invalidate the majority of sentences rendered under it. If not, then instead of being a watershed decision, *Jurek* was a pointless exercise in futility. The country deserves better.

2. *Promise of constancy.*

Casey also recognizes this Court's implied promise of constancy to those who must implement its decisions. Zigzag jurisprudence makes dedicated, conscientious judges and lawyers look like buffoons. Prosecutors make arguments and request instructions in reliance on this Court's approval of procedures. Competent defense lawyers may decline to object or to appeal the issue, concentrating their efforts on arguments likely to succeed. See *Smith* v. *Murray*, 477 U. S. 527, 536 (1986). If the defense does object, the trial court overrules the objection in reliance on precedent. When the precedent is later overruled or distinguished out of existence, the prosecutor is accused of misconduct, the defense lawyer is accused of

incompetence, and the trial judge is accused of disregarding the defendant's constitutional rights. See, *e.g.*, *ante*, at 10 (*Hitchcock*).

Legislatures, also, rely on this Court's precedents. In 1991, in reaction to *Penry*, the Texas Legislature acted to remove the remaining guidance and give the jury what amounts to unfettered, pre-*Furman* discretion in every case of "capital murder." See 3A Tex. Code Crim. Proc. Ann., Art. 37.071(2)(e) (Vernon Supp. 1993). If such additional instructions were constitutionally required, this Court could have and should have said so in 1976. The Legislature could then have amended the statute 15 years earlier. When this Court affirmed Jurek's sentence in a case where no such instruction had been given, it implicitly promised the people of Texas that no such instruction was constitutionally required.

> "The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. From the obligation of this promise this Court cannot and should not assume any exemption when duty requires it to decide a case in conformance with the Constitution. A willing breach of it would be *nothing less than a breach of faith*, and no Court that broke its faith with the people would sensibly expect credit for principle in the decision by which it did that." *Casey*, 120 L. Ed. 2d, at 709, 112 S. Ct., at 2815-2816 (emphasis added).

Let there be no mistake. Johnson is asking this Court for a massive breach of faith with the people of Texas. He is asking this Court to hold that *Jurek*'s approval of the Texas system only applies to rare cases, and that the system previously upheld is now unconstitutional in the vast majority of cases. See Pet. Brief 17. Such a mockery of precedent is contrary to all of the reasons for *stare decisis*.

Some Members of this Court may very well believe that *Jurek* was wrongly decided as an initial matter. The facts remain, however, that *Jurek* was decided in favor of validity and that the people of Texas relied upon it. Disagreement with the initial decision is not a sufficient basis for overruling a precedent of this importance. *Casey*, 120 L. Ed. 2d, at 706, 112 S. Ct., at 2814. If this Court meant what it said in *Casey*, the essential holding of *Jurek* must be upheld.

IV. *Penry* should remain limited to its narrow interpretation.

As the preceding discussion indicates, many of the reasons for not overruling *Jurek* v. *Texas*, 428 U. S. 262 (1976) would support overruling *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). It has already been reduced by subsequent cases, and there are questions about its practical application. Nonetheless, the contrary interests in stability also count, and the damage for future Texas cases has already been done. See *Graham* v. *Collins*, 122 L. Ed. 2d 260, 288, n. 9, 113 S. Ct. 892, 913, n. 9 (1993) (Thomas, J., concurring).

Amicus therefore submits that the best way out of this difficult situation is to declare a cease-fire in place between *Penry*, as narrowly interpreted in *Graham* and *Parks*, on the one hand, and the unmistakable holding of *Jurek* itself, on the other. That is, in a case where the defendant presented compelling mitigating evidence which would universally be considered to substantially reduce his culpability, but which offered the jurors *no* basis for answering either of the special issues "no," that defendant is entitled to a new sentencing hearing. In cases such as *Jurek* and *Graham*, where the evidence could be considered in returning a "no" answer, no additional instruction is constitutionally required.

Application of this rule to the present case is straightforward. This case is indistinguishable from *Jurek*.

CONCLUSION

The judgment of the Texas Court of Criminal Appeals should be affirmed.

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Respectfully submitted,

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